No. 521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

PUBLIC SERVICE CORPORATION OF NEW JERSEY,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Of Counsel.

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CITATIONS

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SECURITIES AND EXCHANGE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioner, Public Service Corporation of New Jersey, prays that a writ of certiorari be issued to review a decree of the United States Circuit Court of Appeals for the Third Circuit affirming an order of the Securities and Exchange Commission.

OPINION BELOW

The findings and opinion of the Securities and Exchange Commission (R. 23-49) are not yet officially reported. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 2057-2066) is reported in 129 F. 2d 899.

JURISDICTION

The opinion of the circuit court of appeals was filed and its order of affirmance was entered on August 12, 1942 (R. 2057, 2066). The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935, August 26, 1935, c. 687, Sec. 24(a), 49 Stat. 803,

834-835 (15 U. S. C. Sec. 79x(a)) and Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Securities and Exchange Commission has in effect held that petitioner, Public Service Corporation of New Jersey (hereinafter called Public Service), is a subsidiary, within the meaning of the Public Utility Holding Company Act, of an entity composed of two holding companies designated by the Commission as "UGI-United". Thereby, Public Service, which is now subject to various provisions of the Act, is made subject also to the "death sentence" provisions of Section 11(b). United Gas Improvement Company, or "UGI", holds 28.4% of the voting securities of Public Service. The United Corporation, or "United", holds 13.9%. In brief, the statute provides that a company shall be held to be a subsidiary if it is "controlled" or "subject to a controlling influence" of a specified character by another. The questions presented are:

(1) Whether the Commission may lawfully, and without evidence, take the sum of the stockholdings of diverse interests and lump them into an artificial entity it designates as "UGI-United" in order to make it appear that a controlling block of voting securities is held by a single interest;

(2) Whether the Commission has discharged its duty under the statute in declining both (a) to hold affirmatively that Public Service is or is not within the statute or (b) to find the basic facts to support its action, the effect of which is that Public Service is determined to be a subsidiary of "UGI-United" and subject to the "death sentence" provisions of the Act;

(3) Whether the mere technical possibility of *future acquisition of* control by "UGI-United" brings Public Serv-

ice within the statute—particularly where (1) the present voting power of "UGI-United" is illusory and problematical in the ordinary corporate affairs of Public Service, (2) the instances are negligible where a two-thirds vote is required in which "UGI-United" might withhold consent, (3) under unrelated provisions of the statute "UGI-United" is in any event requierd to divest itself of its Public Service holdings, to which end separate admistrative proceedings are now nearing conclusion and will preclude all possibility of future control or controlling influence by UGI or United or both, (4) meanwhile such stockholdings of "UGI-United" are sterilized by the Public Utility Holding Company Act itself, and (5) the Act provides several safeguards against the possibility of future control.

(4) Whether the past contacts between Public Service and UGI or United, which are indicative of no control or controlling influence and in which the Commission has not expressly found control by either or both of the latter, are sufficient to bring Public Service within the statute—when such intercorporate contacts involve nothing more than (a) a small minority of common directors with UGI and United which no longer exists, (b) a single joint venture with UGI into the construction business which has been dissolved, or (c) the previous participation of UGI as a stockholder in some matters involving all the stockholders.

STATUTE INVOLVED

This proceeding is brought pursuant to Section 2(a) (8) of the Public Utility Holding Company Act (August 26, 1935, 49 Stat. 803, 15 U. S. C. sec. 79) which, in pertinent part, reads as follows:

> Sec. 2.(a) * * *
>
> (8) "Subsidiary company" of a specified holding company means—

(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause * * * unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company;

* * * * * * *

The Commission, upon application, shall by order declare that a company is not a subsidiary company of a specified holding company under clause (A) if the Commission finds that (i) the applicant is not controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever, (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies. The filing of an application hereunder in good faith shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company of such specified holding company until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of, and as a part of, any order granting such application, the Commission may re-

quire the applicant to apply periodically for a renewal of such order and to file such periodic or special reports regarding the affiliations or intercorporate relationships of the applicant as the Commission may find necessary or appropriate to enable it to determine whether in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke the order declaring such company not to be a subsidiary company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order. Any application under this paragraph may be made by the holding company or the company in respect of which the order is to be entered, but as used in this paragraph the term "applicant" means only the company in respect of which the order is to be entered.

Official "slip law" prints of the complete Act, obtained from the Government Printing Office, are filed herewith.

STATEMENT.

Pursuant to Section 2(a)(8) of the Holding Company Act, Public Service Corporation of New Jersey (herein called Public Service) on November 28, 1935, filed with the Securities and Exchange Commission (herein called the Commission) its application for a determination that it is not a subsidiary of either the United Gas Improvement Company (herein called UGI) of Pennsylvania or The United Corporation (herein called United) of Delaware

(R. 109-127).[1] Hearings were not held by the Commission until April and May of 1941, and the Commission denied the application by its order of September 15, 1941 (R. 22-23). Posing the question as "whether the applicant has demonstrated" freedom from outside control (R. 27-28), the Commission justified its order on the ground that petitioner had "not sustained the burden of proving that it is not controlled by UGI and United, or subject to their controlling influence" (R. 46). Petition for rehearing (R. 51-64) was denied (R. 65-67). On petition for review (R. 1-21) the Circuit Court of Appeals for the Third Circuit (R. 1-21), by its opinion and order of August 12, 1942, affirmed the Commission (R. 2057-2066).

The underlying issue is whether or not Public Service—which is in any case subject to certain other provisions of the statute—shall also be made subject to the "death sentence" provisions of Section 11(b). The undisputed basic facts cover a period of forty years and involve the operations of a state-wide utility system. They are summarized, with complete references to the largely documentary record, in the Appendix separately printed and filed herewith. Throughout this petition references are made to that Appendix detailing the origins, nature, organization, personnel, corporate history, and intercorporate relations of Public Service.

Except to the extent that popular demand makes it necessary to operate certain of its transportation lines over or under the Hudson or across the Pennsylvania line, Public Service is an intrastate utility system operating gas, electric, and transportation enterprises over the greater part

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[1] It also filed an application, pursuant to Section 3(a) of the Act, for the exemption of itself and subsidiaries as an intrastate system (R. 1098-1115). No proceedings were held under this application but instead the Commission issued its Rule U-2 exempting all such systems from the statute. 6 F. R. 2016.

of New Jersey (Appendix, pp. 3-4). It was organized in 1903 by the acquisition of the stock of one electric company and four street railway companies, and the leasing of gas and other electric properties (Appendix, pp. 2-3). Its internal organization is set forth in the Appendix (pp. 4-7).

UGI, as the holder of investments in various gas and electric enterprises throughout the country, held shares in some of these underlying companies and, in the original exchange as well as in subsequent mergers and stock issues, secured its present holdings of Public Service voting securities (see page 42, *infra;* and Appendix, pp. 14-18). In the early 1920's two partners in Bonbright and Company acquired a block of Public Service shares which found their way into United upon the organization of the latter in 1929 (see Point II(B) of the argument *infra*). Except that United also owns more than 10% of the stock of UGI (R. 1117-1118), the present record contains no evidence respecting the relation of United to UGI or of any agreement, understanding, or device between them with direct or indirect reference to or effect upon Public Service.

Without exception, the officers of Public Service Corporation and its subsidiaries are all long-time bona fide residents of New Jersey (R. 241, 245, 246, 441, 442, 759, 1215) and none has been selected or recommended by any other utility interest (R. 627, 723, 758, 827, 857, 869, 847-848, 1211, 1214, 1216, 1218) or has any interest in any other electric, gas, or transportation utility whatever (R. 827-828, 846, 1215, 1217, 1219). With three exceptions,[2] none of the gen-

[2] General Rose, formerly a New Jersey banker, became a director in 1931 and vice president in charge of the southern division in 1932 (R. 237, 534, 1214). The other two are Vice Presidents Thomas N. McCarter, Jr., and Robert A. Zachary, the latter having previously been a newspaper man and secretary to New Jersey's United States Senator (later ambassador) Walter E. Edge (R. 245).

eral officers of Public Service has been with Public Service less than 20 years, and many of them have been with the system since its beginning. Most of them are also directors in the Corporation or its subsidiaries, or both. They have held various positions, some of them progressing from very minor posts. The top officers, however, have been the same for a great many years and their actual responsibilities have been the same regardless of their titles (R. 173-174). Directors are appointed solely upon the recommendation of the higher officers of Public Service (R. 723-725, 928).

Neither United or UGI furnishes service to, conducts or controls operations for, or has common officers or directors with, Public Service or any of its subsidiaries (R. 927-928). No officer or director has ever reported to, or received orders from, any officer or employee of United or UGI, or has observed any control or influence by United or UGI—as shown by the testimony relating to the following officers, offices, and departments of Public Service:

chairman of the boards (R. 269-271, 279, 298-299);
directors (R. 848, 1212, 1214-1215, 1216-1217, 1218-1219);
president (R. 699, 703-705, 710-711, 725-726, 728-731);
chairman of executive committees and former vice president in charge of finance (R. 507, 512, 515-517);
operating committee (R. 474-475, 478-479);
vice president in charge of gas operations (R. 504-806, 815);
vice president in charge of electric operations (R. 759-760, 761-762);
purchasing, real estate, and tax department (R. 681, 862-866, 874, 876-878);
public relations department (R. 835-836, 837-840);
commercial department (R. 482-483);

general attorney (R. 824-827, 828, 832);
general solicitor (R. 628, 630-631, 634, 637);
treasurer (R. 204-205);
secretary (R. 187); and
any and all of them (R. 723-726, 927, 928).

McCarter—the originator, organizer, and chief executive officer of Public Service throughout its history—testified that relations "with all these corporations" had been friendly, by and large, but without control (R. 269, 271, 294-302, 328, 441). If UGI alone or in combination with United should attempt control, "it would create nothing more or less than an uprising in New Jersey. The people of New Jersey would not stand for it. * * * I would give them the greatest battle they ever had * * * I don't think [they] would succeed" (R. 295-296, 300-302). Zimmermann, the president of UGI, testified that the latter had never attempted to control Public Service (R. 938), did not consider that it had control (R. 946-947), and doubted the outcome of any fight for control (R. 989-995), saying: "Anybody who knows Mr. McCarter would know that it would be silly to think that anybody could control Mr. McCarter. It just cannot be done" (R. 938). And he testified that, in the event of a proxy fight, McCarter might bring out the shares to the extent of "90 per cent if he went after it" (R. 992). Both United and UGI denied control or controlling influence over Public Service, and declined to participate in the proceeding (R. 133, 1120-1122).

UGI holds 28.4% and United 13.9% of the total voting securities of Public Service (R. 1391). Including institutions, there are some 86,000 individual shareholders, of which some 43,000 or 50.56% are resident in New Jersey, 17,000 or 20.70% in New York State, and a scattering of from 2% to 7% in Pennsylvania, Massachusetts, and Connecticut (R. 162-163, 754-755, 1032). The percentage of voting

securities, irrespective of individual ownership, held in New Jersey comprises 31% of the total, in Pennsylvania 33%, and in New York 22% (R. 1032-1033). Neither the UGI or United holdings in Public Service have ever been voted except upon form proxies solicited by and given to the management of Public Service in the usual course and without strings or instructions (R. 177, 189-191, 280-282, 1044-1045, 1066-1067).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In affirming and sustaining the findings and order of the Commission to the effect that "UGI-United" or "UGI and United" control, or exercise controlling influence over, Public Service within the meaning of the Public Utility Holding Company Act;

(2) In holding that the Commission relied upon evidence as to the actual relation between United and UGI and impliedly holding that there was substantial evidence to sustain a finding that United controls or exercises controlling influence over UGI;

(3) In failing to hold that the Act creates no presumption of control or controlling influence from the mere fact of ownership by United of 10% or more of UGI voting securities;

(4) In failing to hold that the Commission relied upon a conclusive presumption of control or controlling influence by United over UGI;

(5) In failing to hold that the Act is invalid if, predicated upon nothing more than ownership of 10% or more voting securities, it creates a presumption of either evidentiary or conclusive effect as to control or controlling influence by one corporation over another;

(6) In holding that the Commission is not required to make affirmative findings or conclusions as to whether or not Public Service is or is not controlled by, or subject to the controlling influence of, a holding company;

(7) In holding that the Commission is not required to make affirmative subsidiary findings of fact as to the means, methods, or devices by which "UGI-United" controls Public Service or subjects it to controlling influence;

(8) In failing to hold that the Commission unlawfully cast upon petitioner the burden of demonstrating to the arbitrary satisfaction of the Commission—three members participating—the fact of its independence from control or controlling influence of a holding company;

(9) In holding that the mere possibility of future control or controlling influence is sufficient to render Public Service a present subsidiary of a holding company;

(10) In failing to hold that the Commission has ignored both the statute and the undisputed facts in finding a possibility of future control or controlling influence by "UGI-United" over Public Service;

(11) In failing to hold that the operation of the Act itself precludes, under the undisputed facts here presented, any control or controlling influence by "UGI-United" or either of them over Public Service;

(12) In failing to hold that the Commission, in its findings of "historical relationship" between Public Service and "UGI-United", has ignored the sole evidence and rested decision upon alleged basic facts contrary to the evidence; and

(13) In failing to hold that the Commission has rested its decision upon findings contrary to the sole and undisputed evidence, has acted arbitrarily and capriciously in

refusing to consider all of the evidence, has assumed itself authorized to go beyond the scope and purpose of the Act in determining "public interest", and has undertaken to deny petitioner's application without the findings of basic fact required by the statute and the constitutional requirements of due process of law.

REASONS FOR GRANTING THE WRIT.

The underlying issue in this case is whether Public Service Corporation of New Jersey shall be subject to the "death sentence" provisions of Section 11 of the Public Utility Holding Company Act. It thus presents one of those "concrete situations" which this Court declined to anticipate in its decision in *Electric Bond Co.* v. *Comm'n*, 303 U. S. 419, 443.

The management of Public Service did not oppose the Act but, on the contrary, had a leading part in shaping the provisions here in issue (R. 710, 743-745). The President of the United States, in a statement to the press, mentioned Public Service by name and pointed out that the proposed law was not designed to affect such an institution (R. 742).[3] In the Senate, the committee chairman and manager of the bill stated on the floor:

> Let me say quite candidly that there is not any question about the fact that the Public Service Corporation of New Jersey, if I understand correctly, would be exempt under the terms of this bill. (May 29, 1935, 79 Cong. Rec. 8395.)

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[3] Thus the Wall Street Journal for June 20, 1935, reports the President as explaining "that there are certain holding companies wholly intrastate such as Public Service of New Jersey, which was 95% to 98% intrastate. * * * Such companies are exempted from operations of the bill." And the New York Times for the same date reported the President as saying at his regular press conference that Public Service was an example of the type of utility system "approved by the administration and tolerated by the Senate bill."

Nevertheless, without any change in circumstances or conditions except for even further purging itself of all relations with any other holding company, Public Service is now determined by the Commission to be within the Act to the fullest extent. Only by misinterpreting the statute and assuming many crucial facts contrary to the sole evidence has the Commission been able to reach that result.

The court below, in connection with the facts, merely summarizes the Commission's findings (R. 2059-2061). Its decision, therefore, aids neither the parties nor this Court. In *Detroit Edison Co.* v. *Securities & Exchange Commission*, 119 F. (2d) 730 (C. C. A. 6), cert. denied 314 U. S. 618, from which the court below takes its definition of control, there were common officers as well as a common business office.[4] In *Hartford Gas Co. v. Securities and Exchange Com'n*, 129 F. (2d) 794 (C. C. A. 2), UGI and its wholly owned subsidiary owned nearly 22% of the voting securities of Hartford, had entered upon a 25-year guarantee of dividends on stock issued in connection with Hartford's supply of gas and thus controlled its supply of gas, and Hartford's president had been selected from the UGI system. No attempt was made to secure review by this Court. In *Pacific Gas & Elec. Co.* v. *Securities & Exchange Com'n*,

[4] There North American, held by the Commission and the court to control Detroit Edison, had purchased all of the stock of the underlying companies (p. 733), sold them to Detroit Edison in return for a stock interest which at the time of the proceedings amounted to 23.53% (p. 734), designated substantially all of the latter's directors and principal officers throughout its existence (p. 734-735), participated in its financing and acted as its fiscal agent (p. 735), maintained joint offices in New York (p. 735-736, 737), and denied representation on the board to interests holding substantial voting securities (p. 736). There was no dispute as to the primary facts (p. 736) and the court merely held that the sudden abandonment of the common management office for another in the same building was "no showing that its latent power to resume such control has been extinguished" (p. 739). Indeed, the dicta respecting latent control might well have been omitted from the opinion since there was, to all intents and purposes, direct and present control or controlling influence.

127 F. (2d) 378 (C. C. A. 9), there are presented many of the questions here involved. It was first decided by a divided court in favor of the Commission's interpretation, but has since been set for rehearing.[5] A conflict between the circuits is therefore impending, the problems are of great importance both nationally and in the states where these utilities are located, and—particularly in view of the prominence and nature of the Public Service system—the issues are here squarely presented upon undisputed facts and largely documentary evidence.

The central issue of law in this case and the *Pacific Gas* case involves the interpretation of the Act with reference to the effect to be given clause (A) of Section 2(a) (8) providing that "any company 10 per centum or more of the outstanding voting securities of which are * * * owned, controlled, or held with power to vote" by another is a subsidiary of the latter—unless proceedings, such as those here involved, are brought to determine whether any such company is in fact actually controlled. In the present case, the Commission, as set forth in Point I(A) *infra*, has not only misconstrued this provision as the erection of a presumption with the weight of evidence but, in addition, has applied it as a conclusive presumption upon which to combine UGI and United into an entity it calls "UGI-United" so as

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[5] Rehearing granted, June 6, 1942, 130 F. 2d (Advance Sheets, No. 2, p. viii). That case presents many of the legal issues here involved, but the facts there are that North American, owning nearly 18% of the voting securities of Pacific Gas, has a definite and presently exercised agreement for representation on its board (127 F. 2d 378, 383) and the president of Pacific Gas was formerly a senior executive officer of North American (p. 384). No such factors are present in the instant case. There, moreover, in its original opinion the Circuit Court of Appeals could only justify the Commission's order by adding a fourth standard to Section 2(a)(8), saying: "If the Commission found that none of those three conditions were present, it could still deny the application on the ground that there was a necessity or appropriateness that the act be held to be applicable * * * under the necessity clause" (p. 385). The standards of the section are set forth in Point I *infra*.

to enable it to lump their individual Public Service stockholdings and make it appear that an overwhelming block of voting securities is held by a single interest. Only thus is it able, or does it attempt, to imply outside control or controlling influence over Public Service.

Before presenting the argument, two factors should be noticed: First, that Public Service may or may not be held a subsidiary of either UGI or United or both does not mean that either UGI or United will escape the operation of the Act. For, since they hold securities in many and varied utilities of which Public Service is not the principal one, they will be directed to divest themselves of their Public Service holdings in order, in the words of Section 11(b) (1) of the Act, "to limit the operations of the holding-company * * * to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operation of such integrated public-utility system." With reference to both UGI and United, proceedings to that end have already been instituted and it is only a matter of time until they will be ordered to divest themselves of their Public Service stockholdings (see notes 15 and 16 *infra*).

Secondly, so far as the Public Service system in New Jersey is concerned, the present proceeding is crucial since —if the Commission's present method of proceeding is sustained—Public Service will be irrevocably grouped in the "UGI-United" holding company systems and thus subject to further orders dissolving Public Service Corporation and disposing of its operating subsidiaries. Once Public Service is placed in the "UGI-United" basket, the further orders of the Commission will involve merely the essentially discretionary details of dissolution and disposition.

The question, therefore, comes down to whether the Public Service system of New Jersey shall continue to exist or

shall be dissolved because of the purely theoretical possibility of acquisition of control or controlling influence *at some future time* by "UGI-United", which is in fact an impossibility for the many reasons set forth below including the present operation of various provisions of the Act itself upon both UGI and United. And any such dissolution will thus indirectly be brought about in the face of the numerous provisions of the statute designed to safeguard intrastate utility systems such as Public Service. For the central purpose of the statute is the establishment of single integrated utility systems "interconnected or capable of physical interconnection" which "may be economically operated as a single interconected and coordinated system confined in its operations to a single area or region, in one or more states" (Sections 1(c), 2(a) (29), and 11(b)). But Public Service confines its operations essentially to a single state, and subsections (a)(1) and (c) of Section 3 of the Act require the Commission to exempt systems which "are predominantly intrastate in character and carry on their business substantially in a single state."

The findings and opinion of the Commission to the effect that Public Service is subject to the control or controlling influence of "UGI-United" (R. 23-49) are based upon two grounds:

1) Their combined voting power in Public Service affairs (R. 27-31, 45, 46-47, 48); and

2) Their "historical relationship" to Public Service (R. 31-44, 45, 47-48).

Accordingly, the two points of the argument below are addressed to those two subjects. The following argument, however, will treat only of the findings actually made by the Commission on these subjects, despite the fact that the Commission's opinion in several places attempts to make it appear that there is a vast body of evidence upon

which it might have made findings but did not.[6] Such possibility, which does not exist upon the record in any event, is no concern of this Court upon review. "Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence" (*United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489); and, where an administrative "report does not disclose the basic facts on which it made the challenged order," the courts "will not search the record" (*Atchison Ry.* v. *United States*, 295 U. S. 193, 201). See, to the same effect, *Florida* v. *United States*, 282 U. S. 194, 215; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86; *Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48, 59; *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511.

I. THE ORDER OF THE COMMISSION IS CONTRARY TO THE PUBLIC UTILITY HOLDING COMPANY ACT, INVOLVES MISINTERPRETATIONS OF PIVOTAL PROVISIONS OF THE ACT, AND THUS PRESENTS RECURRING AND IMPORTANT ISSUES OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

This proceeding involves solely the application of the precise terms of Section 2(a)(8) of the Public Utility Holding Company Act. The essential problem, therefore, is

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[6] Thus, it states that "the record is replete with evidence of United and UGI participation in the applicant's affairs. We think it unnecessary to discuss that evidence at any length, except for two highly interesting instances * * *" (R. 35). It then goes on, however, to state that "the record contains numerous other examples of the influence of United and UGI in the affairs of Public Service" (R. 42) and lists and discusses seven of them (R. 42-44). Again it states that, with reference to "the intimate relationship", the "record is replete with other evidence" (R. 44). And again it states that "the record is replete with instances of the exercise of UGI's and United's control and controlling influence over the applicant from 1903 to the present" (R. 47-48). Finally, it specifically disclaims any attempt or responsibility to make findings respecting evil results of the relationship between UGI-United and Public Service (R. 49). These are mere self-serving anchors to windward, for the Commission has caricatured and distorted every item which it felt could possibly be made to appear the basis of a finding against Public Service.

whether the Commission has undertaken to apply the standards of that statute. Section 2(a)(8) of the statute itself prescribes three standards or questions for decision in a proceeding such as this:

> (i) whether "the applicant is * * * controlled, directly or indirectly, by [a] holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever,"
>
> (ii) whether "the applicant is * * * an intermediary company through which such control of another company is exercised," or
>
> (iii) whether "the management or policies of the applicant are * * * subject to a controlling influence, directly or indirectly, by [a] holding company (either alone or pursuant to an arrangement or understanding with one or more other persons)" and
>
> in the latter event whether the controlling influence exercised is such "as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies."

A. The Commission has unlawfully, and without evidence, taken the sum of the stock holdings of diverse interests in order to make it appear that a controlling block of voting securities is held by a single interest which the Commission calls "UGI-United".

It is apparent that such control, or controlling influence, as the Commission apprehends rests upon stock representing 42.3% of the voting securities of Public Service, which the Commission stresses at the outset and conclusion of its opinion (R. 27, 28, 45) and which represents "the combined holdings of UGI * * * and United" (R. 28). Without that comparatively large percentage, implications

of control would disappear on this record. The Commission attributes the ownership of this comparatively large block of stock to an entity described in its "historical relationship" discussion as "UGI-United" (R. 28-45) and in its discussion of voting power at the beginning and conclusion of its opinion as "UGI and United" (R. 28-30, 45-49). The Commission invents or assumes this "UGI-United" entity, and it is this assumption which is the heart of its decision. In the court below, italicizing its words, the Commission made this very point—"that this Court may dispose of this case upon the one overpowering circumstance of stock ownership alone" (Comm'n Brief, p. 18).

That United holds 10% or more of the voting securities of UGI does not make UGI a subsidiary of United so far as their relation to Public Service is concerned. It is true that the Public Utility Holding Company Act defines subsidiary as "any company 10 per centum or more of the outstanding voting securities of which are * * * held" by another, but the very purpose of the remainder of the section and proceedings such as the instant one is to set aside that rule of thumb upon the filing, as here, "of an application * * * in good faith" (Section 2(a)(8)). After the filing of such an application and the submission by applicant of a prima facie case of its independence and freedom from control, the issue is at large until determined by the Commission upon the record.[7] That this

[7] The situation is no different from the initiation of new rates in lieu of those previously filed and presumptively lawful and reasonable. In such a situation this Court has said, speaking through Mr. Justice Cardozo, that "all that the [party] has done is to initiate a schedule which must be upheld as lawful unless adequate reasons are presented for setting it aside." *United States* v. *Chicago etc. R. Co.*, 294 U. S. 499, 510.

For the general principle Thayer, Preliminary Treatise on Evidence, p. 357, quotes as "a clear expression" the language of Lord Justice Bowen: "In every lawsuit somebody must go on with it; the plaintiff is the first to begin, and if he does nothing he fails. If he makes a *prima facie* case, and nothing is done by the other side to answer it, the defendant fails." *Abrath* v. *No. E. Ry. Co.*, 32 W. R. 50, 53.

is so is emphasized by the specific provision of the Act that the mere institution of the proceeding "shall exempt the applicant from any obligation, duty, or liability imposed in this title * * * until the Commission has acted upon such application" (Section 2(a)(8)). Congress has carefully and intentionally refrained from imposing any yardstick, once the issue is raised, because 10% interests might be held by ten different parties, 20% by five, or 30% by three. And there is an infinite variety of further combinations and factors which may preclude control or controlling influence in any one interest or group.[8] All that Congress has done is to fix a figure beyond which any party affected must initiate a proceeding of the type here involved.

The question here, therefore, is not whether United owns 10% or more of the voting securities of UGI but whether *in fact* United controls UGI or otherwise combines with UGI to control Public Service. As the matter was explained on the floor of the Senate by the manager of the measure,

> Even if they hold 40% of the stock of a company they may come before the Commission and produce evidence that they are not actually in control of the company. (79 Cong. Rec. 8397.)
>
> Unless I control that company I am not a holding company under the terms of this bill. The mere ownership of the 10 per cent of the stock does not of itself make him a holding company, because unless he actually controls the company he is not a holding company. (79 Cong. Rec. 8439.)

The issue of fact as to control or controlling influence by United over UGI was not raised by the Commission either

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[8] An illustration is *In the Matter of Detroit Edison Company*, 7 S. E. C. 968, aff'd 119 F. 2d 730, cert. denied 314 U. S. 618, wherein North American held 19.28% of the voting securities of Detroit Edison and American Light & Traction Company (a subsidiary of United twice removed) held 20.27%. The Commission held that North American, rather than United or American Light, controlled Detroit Edison.

before or at the hearing. Public Service, on the other hand, submitted its proof of independence from any outside holding company influence. The Commission does not state or find that, in the words of the statute, there is any "arrangement or understanding" or any other "means or device whatsoever" by which UGI and United control Public Service.[9] It relies solely upon its own assertion that "UGI is admittedly a subsidiary of United" (R. 27). But petitioner has never, and does not now, admit that UGI is a subsidiary of United in any sense relevant in this proceeding; and there is no evidence in the record as to the actual relations between the two. They also deny any such control as specified by the statute (R. 1116-1118, 1120-1122). There is therefore no basis whatever in the record upon which the Commission is justified in lumping UGI with United to form an entity controlling Public Service.

The Commission, therefore, has made an assumption. In the words of Mr. Justice Cardozo,

> From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. (*Ohio Bell Tel. Co.* v *Comm'n*, 301 U. S. 292, 302; and see to the same effect *West Ohio Gas Co.* v. *Comm'n* (*No. 1*), 294 U. S. 63, 70.)

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[9] This failure to explain the reason for uniting UGI and United as a group entity is also relevant in connection with Point I(B), *infra*, that the Commission has failed to make the necessary findings. The situation is precisely comparable to group rates, in which connection this Court without dissent has said: "The Commission's failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order." *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86.

Assuming that the Commission may have relied upon information it happened to have acquired elsewhere does not change the situation for, in the words of Mr. Justice Brandeis, the parties "were left without notice of the evidence with which they were, in fact, confronted." *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 289. Any other rule "would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute." *Interstate Com. Comm.* v. *Louisville & Nash. R. R.*, 227 U. S. 88, 93.

The statute here does not even erect a presumption—much less one having conclusive or even evidentiary effect.[10] Nor, as this Court has recently held without dissent, is it within the prerogative of an administrative agency to do so:

> The vice of the regulation * * * is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power. (*Miller* v. *United States*, 294 U. S. 435, 440.)

And even if there were or could be a presumption, its effect would be no more than to require petitioner to present a prima facie case—as it has done—after which the issue would be justiciable solely upon the record as in any other

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[10] Had Congress attempted to do the latter, there would have been presented constitutional questions as to validity such as this Court has often considered. In this connection, a conclusive presumption that a gift within two years of death shall be taken as one made on contemplation of death has been held invalid. *Heiner* v. *Donnan*, 285 U. S. 312, 329. And according the weight of evidence to statutory presumptions relating to railroad accidents or bank insolvencies has been denied validity. *Manley* v. *Georgia*, 279 U. S. 1, 6; *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639, 642-644; *Mobile etc. R. R.* v. *Turnipseed*, 219 U. S. 35, 43.

case.[11] But that the Commission in terms relied upon an assumed presumption is apparent from its statement that it "may properly treat UGI and United as one" upon the authority of its own previous decision in *Manchester Gas Company,* 7 S. E. C. 57, 63, where it held that the stockholdings of United in UGI bring the latter "presumptively under the control of The United Corporation" (see also note 13 *infra*).

As is apparent on the face of its opinion, however, the Commission has here not only invented an assumption or presumption but has taken it as having conclusive effect. It first states the 10% or more holdings by each UGI and United in Public Service and then states that the latter "is thus a subsidiary" (R. 27). Upon the same basis it assumes that "UGI is * * * a subsidiary of United" (R. 27). Thus it has not only taken an assumed presumption in determining the relations between Public Service and UGI, but it has done the same again with reference to the relations between UGI and United. In so doing it has founded one presumption upon another.[12]

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[11] A "presumption is not evidence and may not be given weight as evidence." *New York Life Ins. Co.* v. *Gamer,* 303 U. S. 161, 171. "The legal effect of the presumption was to cast upon the * * * company the duty of producing some evidence * * * whereupon the inference was at an end." *Atlantic Coast Line* v. *Ford,* 287 U. S. 502, 507. The only legal effect of a presumption "is to cast upon the * * * company the duty of producing some evidence * * * . When that is done the inference is at an end, and the question * * * is one * * * upon all of the evidence." *Mobile etc. R. R.* v. *Turnipseed,* 219 U. S. 35, 43. This Court has only recently summarized the law as follows:

> Once the [party] has carried his burden by offering testimony sufficient to justify a finding * * * the presumption falls out of the case. It never had and cannot acquire the attribute of evidence * * *. The issue must be resolved upon the whole body of proof pro and con." *Del Vecchio* v. *Bowers,* 296 U. S. 280, 286-287.

[12] "One presumption cannot be built upon another." *Looney* v. *Metropolitan Railroad Co.,* 200 U. S. 480, 488. Proof may not be made "by piling inference upon inference, and presumption upon presumption." *United States v. Ross,* 92 U. S. 281, 283.

Its implied reasoning is apparently that

1) United is conclusively presumed to control UGI;

2) Therefore the stockholdings of United and UGI may be added together to arrive at the substantial total of 42.3% of the voting securities of Public Service;

3) The Commission finds that 42.3% of the voting securities is present potential control or at least a controlling influence; and

4) Therefore, Public Service is a subsidiary of "UGI-United".

That this is the theory upon which the Commission has proceeded is demonstrated in other proceedings [13] and admitted in its brief in the court below, where it said:

> Any other course would require the Commission to try a number of issues concerning control in each case even though the companies in the higher layers of the holding company pyramid had no applications pending for a determination of their status among themselves, and were not parties to applicant's proceeding. (Brief for Respondent, p. 13.)

And by way of footnote at the same place it stated that:

> It is doubtful whether petitioner may collaterally attack the status of UGI or United under the Act. Sec-

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[13] In *The Matter of Manchester Gas Company*, 7 S. E. C. 57, 63, the Commission reasoned as follows: "The United Corporation holds beneficially approximately 26 per cent of the outstanding voting securities of UGI. No application is pending for an order declaring UGI not to be a subsidiary of The United Corporation, nor has any such order been issued by this Commission. The foregoing facts bring The United Corporation within the definition set forth in Section 2(a)(7)(A) of the Act, as a holding company for UGI, and make UGI a subsidiary of The United Corporation under Section 2(a)(8)(A) and presumptively under the control of The United Corporation. These facts, together with the fact that MGC is, according to our finding herein, a subsidiary of UGI, point to the conclusion that MGC is indirectly subject to a controlling influence by The United Corporation." Public Service was, of course, not a party to this proceeding.

> tions 2(a)(7) and 2(a)(8), prescribing the exclusive statutory procedure for the disestablishment of subsidiary status under the Act, permit only United or UGI to file an application for an order declaring UGI not to be a subsidiary of United.

But no collateral attack is here involved, since the present proceeding directly involves the relationship of UGI and/or United to Public Service, and the statute requires the Commission to determine the fact. UGI or United may never have occasion to test their relationship, and their forbearance cannot bind Public Service.

Despite the foregoing, the court below ignored this crucial issue and held that (R. 2062):

> The Commission did not rest its decision upon any presumption arising from the ownership of 10% of voting stock of a utility company by a holding company but relied entirely upon evidence presented at the hearing before its trial examiner as to the effect of the stock ownership upon the relations of the three corporations.

Thus the Circuit Court of Appeals committed basic errors (1) in holding that the Commission had relied upon evidence as to the actual relation between United and UGI, (2) in impliedly holding that there was substantial evidence upon which the Commission could so rely, (3) in failing to hold that the Commission had invented a conclusive presumption predicated upon United's ownership of 10% or more of the voting securities of UGI, and (4) in failing to hold that such a presumption is both unauthorized by the Act and violative of the due process clause of the Fifth Amendment.

The vice of the Commission's mode of procedure is (1) the statute, which provides for a trial of the issue, is ignored, (2) a presumption is not only invented by the

Commission but is regarded as conclusive of the actual relation of United to UGI, and (3) upon this assumption the sum of their stockholdings is utilized to find control in the fictitious entity "UGI-United." The result is to set at naught the record and render the hearing required by law a mere formality. The Commission, therefore, has made no attempt to find or decide in accordance with the "actualities in such intercorporate relations." *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146. Such arbitrary procedure manifestly requires the exercise of the supervisory power of this Court as to the issues of law so presented.

Unless the Commission can sustain its invention of "UGI-United" upon the record, the case must go back to the Commission for further proceedings, for the present findings do not relate to either UGI or United singly and as stated above there is no evidence upon which to predicate findings as to them jointly. It is unnecessary to prognosticate what the Commission might lawfully have found as to the relation between Public Service and United alone, or between Public Service and UGI alone, for the administrative power has not been exercised with reference to either of those questions. For this Court to do so would usurp the original jurisdiction of the administrative agency. Upon remand—as sought through this Petition—the Commission may attempt to prove one or more of three propositions:

> 1) That *in fact* United actually controls or has present power to exercise controlling influence over UGI so that their stock holdings in Public Service may be taken as held by a single interest, or that UGI and United act jointly with reference to Public Service pursuant to some understanding, arrangement, or other device;

2) That *in fact* United alone controls or has present power to exercise controlling influence over Public Service; or

3) That UGI alone and *in fact* controls or has present power to exercise controlling influence over Public Service.

Petitioner is confident that the Commission cannot sustain any one of those propositions, and by this Petition it seeks an opportunity for a hearing and findings on those issues.

B. The Commission has made none of the findings required by the Act.

Illustrative of the arbitrary nature of the Commission's treatment of the case is the circumlocution by which it reaches its decision. It makes no affirmative finding or conclusion, ultimate or otherwise. In the preliminary statement of the question presented, the Commission puts it as whether Public Service "has demonstrated that it is not controlled", etc. (R. 27); and in its conclusion states only that petitioner "has not sustained the burden" (R. 45-46) arbitrarily imposed upon it by the Commission and that therefore the Commission "cannot find * * * that [petitioner] is *not* controlled by, or subject to the controlling influence of," two holding companies which the Commission treats as one (R. 49).

In so failing to state in affirmative form an answer to any one of the four questions propounded by the statute the Commission is not referring to any failure on the part of petitioner to come forward with substantial evidence and make a prima facie case respecting its independence. That evidence is in the record in the form of the lack of common personnel, facilities, or operations as well as the lack of any control or attempt at control or controlling influence by any outside interest whatever.

The novel position of the Commission, therefore, is that it may decide this proceeding without the positive findings—either basic, subsidiary, or ultimate—required by the Congressional mandate of the statute. It declines to make affirmative findings solely because it chooses to say that petitioner "has not sustained the burden of proving" its independence. None too sure of the soundness or essential merit of this evasive tactic, it states, however, that it *could* make affirmative findings—that the facts "afford" a "justification" for, and that the record is "replete" with evidence upon which the Commission might make, findings of control if it chose to do so upon the basis of the stockholdings of "UGI-United" (R. 47-48). But until the Commission does so, petitioner is deprived, not only of a specific and intelligible decision, but of any effective opportunity for judicial review.

This Court has frequently announced that, in the absence of a "definite finding" upon an essential question, it

> will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. (*Atchison Ry.* v. *United States*, 295 U. S. 193, 201-202; and to the same effect *United States* v. *Pyne*, 313 U. S. 127, 130; *United States* v. *Chicago, etc., R. Co.*, 294 U. S. 499, 505, 511; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489.)

Findings must be "specific on [the] ultimate and determinative issue" (*United States* v. *Pyne*, 313 U. S. 127, 130). If an administrative agency may make "vague findings", "then statutory rights will be whittled away" (*United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489). In the words of Mr. Justice Brandeis, statutes do "not confer

upon the Commission legislative authority'' but only defined authority and

> its finding to that effect is essential * * * and * * * the order may be set aside unless it appears that the basic finding was made. (*United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454, 462-463.)

The Commission, if it had intentionally attempted, could not have more artfully stated its case in its opinion so as to make its precise position equivocal. Thereby, however, it runs afoul of the rule as stated by Mr. Justice Cardozo:

> We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. * * * The difficulty is that [the Commission] has not said so with simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. (*United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510.)

And the Commission's admission that it has not purported to find the issue—that the record affords ''justification'' and that it would ''have no hesitancy in affirmatively finding'' the issue (R. 46, 47)—brings its procedure even more precisely within the recent condemnation of this Court.[14]

What has been said so far relates only to the ultimate conclusions. The Commission makes no attempt whatever to explain its implied conclusion by ''a suitably complete

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[14] "A statute expressive of such large public policy * * * must be broadly phrased and necessarily carries with it the task of administrative application. * * * The Board determined only the dry legal question of its power. * * * The administrative process will best be vindicated by clarity in its exercise. * * * It will avoid needless litigation and make for effective and expeditious enforcement." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194-197.

statement of the grounds of * * * determination" (*Florida* v. *United States,* 282 U. S. 194, 215) in accordance with the mandate of the statute that there shall be "findings of the Commission as to the facts" (Section 24(a)) with reference to "control" or "controlling influence" by any "arrangement or understanding" or through "intermediary persons" or by any "device" (Section 2(a)(8)). Not only is there no positive finding of control or controlling influence, but there is no specification as to what means or methods are utilized to effectuate an implied control or controlling influence. Petitioner's objection is not technical, for without even the ultimate finding in positive terms—to say nothing of subsidiary findings—the issue is at large and even this Petition must search the record and compare the vague and varied assertions of the Commission's opinion.

C. The Commission has ignored the statute both in holding that there is a possibility of future control or controlling influence by "UGI-United" and in construing such a possibility as sufficient to render Public Service a present subsidiary.

Taking the sum of the stockholdings of the fictitious entity "UGI-United", the Commission does not even imply present "control or controlling influence" but merely the *possibility* of future acquisition of such control or controlling influence. Petitioner does not suggest that any company with present control of, or controlling influence over, another—whether exercised or not—does not render the latter a subsidiary within the meaning of the statute. But the point is that an analysis of the law and the facts here presented discloses that there is no present ability of UGI or United to exercise control or controlling influence over Public Service.

Both the court below (R. 2062-2063) and the Commission interpret the statute as meaning something less than control. The Commission has heretofore stated that "Congress meant by the term 'controlling influence' something less in the form of influence over the management or policies of a company, than 'control' of a company." *In the Matter of H. M. Byllesby & Company et al.*, 6 S. E. C. 639, 651. It has, as a matter of fact, departed from the position taken on the single occasion when this statute was before this Court for argument, for it there said, with italics:

> A holding company, by express definition * * * is a company which *actually controls* operating companies, and not a company which merely has an investment in operating companies. Conversely, a subsidiary company, by express definition * * * is a company *actually controlled* by the holding company, and not simply a company in which the holding company has a substantial interest. (*Electric Bond & Share Co.* v. *Securities and Exch. Comm.*, Br. for Resp., Appendix A, p. 6, decided by this Court in 303 U. S. 419.)

If there is any difference between "control" and "controlling influence" it must be that the former is a formal power of control while the latter may arise through circumstances such as financial, operating, or other close relationships amounting to power of control. But that "control" and "controlling" were intended to mean actual control is manifest from the report of the Senate Committee, where the provisions here relevant were "completely rewritten in the interests of clarity and definiteness" to substitute "controlling influence" for the previous provision specifying "material influence"; and it was explained that a corporation is a holding company and conversely another is its subsidiary only if "the Commission finds that [the former] exercises a 'controlling influence' over the management or

policies'' of the latter (Sen. Rep't No. 621, 74th Cong., 1st Sess., p. 5). The Senate Committee Chairman in charge of the measure stated on the floor that ''the Commission is directed to make a finding and to exempt them if they are not actually controlling the company as the word 'control' is defined in the bill'' (79 Cong. Rec. 8397) and that ''unless he actually controls the company he is not a holding company'' (79 Cong. Rec. 8439).

1. In the ordinary corporate affairs of Public Service, the voting power of ''UGI-United'' is illusory.

It is true, of course, that as compared with the holdings of UGI and United the voting securities of Public Service are widely held. But, despite the Commission's attempt to minimize the fact, the next thirty stockholders may vote more than 8% of the stock of Public Service (R. 23) and are substantial and independent interests quite capable of protecting their investments (R. 1396-1399). Many Public Service shareholders are institutional investors (R. 164) who receive more detailed reports than anyone else respecting the operations of Public Service (R. 685-686). While it is true that in recent years, except 1941 when United's stock was not voted (R. 1044), UGI and United have contributed slightly more than half of the stock actually voted at stockholders' meetings (R. 29), that has been true only since 1929 when the stock held by United came into the picture (R. 1390-1391) and neither the UGI nor United stock has been voted except upon form proxies solicited by and given to the management in the usual course and without strings or instructions (R. 177, 189-191, 280-282, 1044-1045, 1066-1067).

With 85% of the voting shares represented at any stockholders' meeting, as the only witnesses who testified said could be secured (R. 167, 302, 992), ''UGI-United'' could be outvoted. The Commission therefore finds it necessary

to prognosticate as to the event and result of a proxy fight. It states that, when two-thirds of the shares of each class were necessary at a meeting in 1936 with reference to the reorganization of the Public Service transportation subsidiaries (see Appendix, pp. 21-22) only 79.1% of the total voting shares were secured; and it calls this an "extraordinary" effort (R. 29-30, 47). But the difficulty there was getting in the preferred stock (R. 163), it wasn't a "proxy fight" (R. 178, 932), no special effort was made with reference to the common stock nor was any very unusual or long-sustained effort made in any event (R. 1040, 1067-1072), and the effort ceased "when we received a sufficient number of proxies" (R. 168). In view of the essentially local nature of its business and the residence of a majority of its shareholders in New Jersey, any attempt of "UGI-United" to seize control would obviously, in the words of McCarter, "create nothing less than an uprising in New Jersey" (R. 295, 294-298). In such an event, McCarter testified that he could bring out "pretty close to 100 per cent stock vote" (R. 302) and Zimmermann of UGI admitted that McCarter might bring out "90 per cent if he went after it" (R. 992). It is thus far from true that, as the Commission would have it, "the stockholdings of UGI and United * * * make it almost certain that United and UGI would prevail in any such conflict" (R. 30). In any event, there would be a conflict before "UGI-United" could secure control and—as set forth *infra*—neither UGI nor United is in a legal position to undertake such a conflict.

Again, the Commission finds that "UGI can at any time it desires obtain representation on applicant's board" (R. 48). That is no more true than its power in any other affairs of Public Service, since there is no cumulative voting. Moreover, mere representation is not control and, since only a third of the directors are elected every three years, it would take a substantial period for anyone to ob-

tain control through such representation even if it were possible to do so (R. 294-295, 1150-1152). Every argument or reason put forward by the Commission, therefore, is merely theoretical and anticipatory. Against such possibility, if it in fact exists, the Act itself provides separate safeguards as set forth below in Point 4.

2. Instances requiring a two-thirds vote of shareholders, in which the voting power of "UGI-United" might be effective, are insignificant.

The Commission next discusses the effect of the joint exercise of the right to vote this 42.3% block of stock in matters requiring a two-thirds vote of stockholders, and finds that "UGI-United" could *prevent* the following (R. 31, 47):

> (1) "Changes in name"—but Public Service has spent forty years building up good will under its present name, and certainly this matter does not require the imposition of the death sentence and other sanctions of the Act;
>
> (2) "Changes in * * * nature of business"—but no public harm can come from Public Service remaining, as it is, solely a holding company, predominantly intrastate, and as such entitled to an exemption under Section 3(a)(1) of the Act and Rule U-2 of the Commission;
>
> (3) "Changes in * * * objects or powers"—but here again nothing contrary to the public interest can come from leaving Public Service in its present business, for which it has ample authority;
>
> (4) "Extension of corporate existence"—but all of the corporations in the Public Service system already have perpetual existence;
>
> (5) "Increase or decrease of capital stock," "changes in par value, classes of stock, number of outstanding

shares of any class," "creation of preferred or other special stock," and "provisions for readjustment or reclassification of capital stock"—but there is sufficient authorized but non-issued stock of each of the classes to provide for financing for years to come without any further amendments, and the organization has reached the stage where there is no need for any of the possible changes listed by the Commission.

(6) "Provisions for funding or satisfying rights in respect to dividend arrearages"—but there are no such arrearages, which could only accrue in connection with preferred stock in the Public Service system; the record of earnings indicates that none may be anticipated in the future; and dividends have been paid regularly since 1904 even on common stock;

(7) "Changes in existing provisions for the regulation of the management and affairs of the corporation, and any other amendments, changes, or alterations as may be desired"—but existing provisions are broad and general so that there is no occasion for stockholders' action; and

(8) "Any merger or consolidation"—but Public Service, as shown at pages 3-6, 20-22 of the Appendix, has perfected its corporate structure so that there will in all likelihood never be occasion for the exercise of this power.

Of the foregoing, only the last is repeated in the Commission's conclusions (R. 47). Moreover, none of these things, even if they ever come to a vote, are such as would provoke controversy or move any interest to take the spotlight by attempting the "absolute legal veto" which the Commission mentions. If the management and New Jersey shareholders proposed any such actions, they would obviously be approved or disapproved on their merits.

3. The stockholdings of "UGI-United" have been so sterilized by the Public Utility Holding Company Act that "UGI-United" can wield no influence upon Public Service.

Irrespective of the result of the present proceeding, the Commission has heretofore determined that UGI is precluded by the Public Utility Holding Company Act from continuing to hold its 28.4% of the voting securities of Public Service.[15] It has done the same with respect to the 13.9% holdings of United in Public Service.[16]

Moreover, both UGI and United are registered holding

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[15] The Commission in March, 1940, instituted "death sentence" proceedings (Release No. 1593), on May 23, 1940, agreed to furnish tentative conclusions (Release No. 2065) and in January, 1941, filed its tentative conclusions and an order reconvening the hearing (Release No. 2500) accompanied by a report of the Public Utilities Division (the latter was amended and refiled on March 27, 1941). On February 21, 1941, an order was entered for UGI to show cause why it should not forthwith be directed to divest itself of holdings in certain companies (Release No. 2571), and on April 15 and July 31, 1941, orders were filed requiring divestiture (Release Nos. 2692, 2319). Thus, in precisely applicable situations, UGI has already been held to be required to divest its interest. On April 9, 1941, the Commission issued its order for UGI to show cause why it should not be required to divest itself of its interest in Public Service and on April 29, 1941, the matter was reserved for future consideration. On September 3, 1942, after the determination of the present proceeding by the Circuit Court of Appeals, the hearing respecting divestiture by UGI was reconvened (Release No. 3778). The matter has been heard, argued, and is awaiting decision by the Commission.

By these decisions of the Commission, and also those in the *North American* case (Release No. 3405), *Electric Bond and Share* case (Release No. 3750), and *Engineers Public Service* case (Release No. 3796), these registered holding companies will be required to divest themselves of their holdings in companies like Public Service irrespective of whether the latter are held finally to be subsidiaries or not.

[16] On March 5, 1941, United filed with the Commission its plan of divestment which included its Public Service holdings (Release No. 2596), on July 28, 1941, the Commission issued its order to show cause why divestiture should not be ordered and for consideration of the plan filed (Release No. 3015), and the matter has been heard, argued, and is awaiting decision.

companies. They are therefore precluded meanwhile by the Public Utility Holding Company Act itself from:

1) Acquiring any further holdings in Public Service (Section 9(a)(2));

2) Selling their Public Service stock except with the consent of the Commission (Section 12(d));

3) Negotiating, entering, or taking any step in the performance of "any transaction not otherwise unlawful under this title" with Public Service except with the consent of the Commission (Section 12(f) and (g));

4) Entering or taking any step in the performance of "any service, sales, or construction contract" with Public Service without the consent of the Commission (Section 13(e)); and

5) From failing to keep such records or make such reports as the Commission may require with respect to their Public Service holdings (Sections 14 and 15).

Thus the Commission has not only held in effect that Public Service is controlled by "UGI-United" which are already in the shadow of divestiture so far as their Public Service holdings are concerned, but by virtue of the operation of the Public Utility Holding Company Act itself their stockholdings are—or at least may be if the Commission so desires—effectively sterilized. Even though they may be permitted to vote, they cannot without the consent of the Commission receive or acquire any benefit from such vote or otherwise.

4. *The Act itself lays down safeguards in the event that control or controlling influence by "UGI-United" should develop, and thus recognizes that the mere possibility of such future control is insufficient to render Public Service a present subsidiary.*

There are at least three further safeguards which the Public Utility Holding Company Act itself lays down in the event that actual control of Public Service or controlling influence by "UGI-United" should develop.

(1) First is the provision of Section 2(a) (8), under which this proceeding is brought, that

> As a condition to the entry of, and as part of any order granting such application, the Commission may require the applicant to apply periodically for a renewal of such order and to file such periodic or special reports regarding the affiliations or intercorporate relationships of the applicant as the Commission may find necessary or appropriate to enable it to determine whether in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective.

(2) Second is the further provision of Section 2(a) (8) that the Commission may both (a) "revoke the order declaring [Public Service] not to be a subsidiary company" or (b) "modify the terms of such order whenever in its judgment such modification is necessary."

(3) Finally—even though Public Service is not a subsidiary—UGI, United, and Public Service are each nevertheless affiliates of the others (Section 2(a) (11)). As such, as to each other they are forbidden by subsections (f) and (g) of Section 12 of the Act—

> to negotiate, enter into, or take any step in the performance of *any transaction not otherwise unlawful* under this title, * * * in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circum-

vention of the provisions of this title or the rules and regulations thereunder. (Emphasis supplied.)

In other words, it is unnecessary to discuss the further provisions of the Act since these subdivisions alone bring within the ambit of the Commission's authority "any transaction not otherwise unlawful."

There is thus no reason whatever for the Commission to subject Public Service to the "death sentence" provisions of the Act because of mere theoretical suspicion that either UGI or United may at some future time be able to acquire and exercise control or subject Public Service to their controlling influence. The Act itself has wisely provided that, should such an event occur, the Commission is fully armed to protect the public interest.

II. IN AFFIRMING THE COMMISSION'S STATEMENTS AS TO THE "HISTORICAL RELATIONSHIP BETWEEN PUBLIC SERVICE AND UGI-UNITED"—WHICH ARE CONTRARY TO THE SOLE EVIDENCE—THE COURT BELOW HAS SO FAR SANCTIONED A DEPARTURE FROM DUE PROCESS OF LAW AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Although the Commission's opinion, in its findings and reasons, begins and concludes with statements as to the voting strength of "UGI-United" in Public Service affairs (R. 27-31 as set forth in Point I *supra*), the bulk of its findings and opinion is based upon the stated premise that "evidence of the historical relationship between Public Service and UGI-United over a period of 35 years is of material significance and has a material bearing on the present relationship of these companies" (R. 45.)

As in its discussion of voting strength, the Commission has here invented a new entity—"UGI-United"—to wield the "controlling influence" it apprehends. However, because the relationship of UGI to Public Service is very dif-

ferent from that of United, they must necessarily be treated separately. This development, rather than the confused and commingled statement of the Commission, is made necessary not only because the nature of the relationship of UGI or United to each other and to Public Service has been different at different times but because, taken as a whole, the relationship springs from different sources and, such as it is, differs in character. Still a third category of personnel is injected into the picture in some of the Commission's statements—i.e., the Morgan affiliated banking house of Drexel & Company—so that it will also be necessary to describe separately their relations to Public Service (Appendix, pp. 71-73).

In the main, such contacts as there were between Public Service and either UGI or United came about through, and involved nothing more than, the following interlocking directorships which never meant control or controlling influence by the participants, had been dwindling for 30 years, and have been completely non-existent for some years:

Years	Total directors	Directors not affiliated with "UGI-United"	Directors also affiliated with UGI	-or- United	Percent of directors not affiliated with UGI or United
1903-1908	24	19	5		79% plus
1908-1914	21	16	5		76% "
1914-1917	21	17	4		81% "
1917-1923	18	14	4		77% "
1923-1924	15	12	3		80% "
1924-1925	18	15	3		83% "
1925-1930	15	13	2		86% "
1930-1934	15	13	1	1	86% "
1934-1935	12	10	1	1	83% "
1935-1938	12	11	1	0	91% "
1938-....	12	12	0	0	100%

Thus, since the very beginning of Public Service not less than three-fourths of its directors have at all times been independent of affiliation with UGI or United. Common directorships, in any event, do not mean control *over* Public Service any more than they mean control *by* Public Service over the others. The evils of interlocking directorates are governed by separate statutory provisions not here involved, with which Public Service has more than complied.[17]

A. The "historical relationship" between UGI and Public Service is indicative of no control or controlling influence by the former and the Commission has found no such control or influence.

UGI holds an "omnibus" charter from Pennsylvania and, since the 1880's, as its principal business has owned investments in utilities scattered over a good part of the country (R. 977-980, 986-987). While its principal activity has been the holding of utility investments, it has also owned certain patents connected with the gas and heating industry (R. 980). A Commission report on this company on January 22, 1941, with reference to the application of the Holding Company Act to it (Release No. 2500) states that its first interests were in patents for the manufacture of water gas; that "within a decade of its organization it owned securities of gas companies in communities in many states of the Union"; and that

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[17] It may be noted that the Commission in its opinion repeatedly takes the position or intimates that resignations from the board of Public Service after the enactment of the Public Utility Holding Company Act, for any reason whatever, are due to some sinister motive (R. 33, 34, 35, 45) and finds that, "in this context, the absence of interlocking directors is not entitled to any great weight" (R. 48). But no reason is to be perceived why any person or corporation may not bow to the "new philosophy abroad that these interlocking directorships should not continue" as was done here before the Utility Act was passed, or comply with law (R. 318, 322-323, 441, 952-955).

> The electric facilities [of Public Service] * * * constitute a major enterprise in their own right. Their operations at least in recent years, have not been in any way related to The United Gas Improvement Company system either for financing, use of personnel or any other operating functions except for the interchange of excess energy and the use of the facilities of Public Service Corporation of New Jersey for the delivery of power to the Pennsylvania Railroad Company. (*In the Matter of The United Gas Improvement Company and Its Subsidiary Companies, Respondents*, File No. 59-6, pp. 2, 118, 119.)

The same is there said of the gas operations of Public Service.

The source of the relationship between Public Service and UGI was the desire of the organizers of Public Service to acquire the stock of United Electric Company of which UGI owned 50% and to secure long-term leases of two gas companies and one gas-electric property which were controlled by UGI, as shown by the plan of organization (R. 1123, 1142). The plan did not call for any capital investment by UGI, though it had a right to subscribe for a part of the capital stock at par upon the same terms as the stockholders of the four street railway companies and the holders of the other stock of United Electric Company and South Jersey Gas, Electric, and Traction Company (R. 1123). UGI did subscribe for a part of its quota of the stock of Public Service, taking only 25,000 shares at par and paying therefor $2,500,000 (R. 32, 222, and Applicant's Exhibit 56 not printed). Thereupon, as shown in the table above, five persons connected with UGI were elected to the first Public Service board which consisted of 24 members; and their number was gradually reduced to one in 1930 and since 1938 there have been no common directors.

The Commission does not flatly say that UGI originated or organized Public Service, or that the latter is its pawn or tool, or that UGI dictates its policies. All that the Commission says is that certain intercorporate contacts are "of material significance" (R. 45). The undisputed facts with reference to each of the following ten items, which are all that the Commission mentions, are set forth in the Appendix at pages 22-65:

(1) The Commission's statements respecting the role of UGI in the organization of Public Service (R. 31-33) are entirely unfounded, since UGI participated only as *one* of the holders of securities in four of the nine properties which became Public Service (Appendix, pp. 22-29);

(2) The Commission's statements respecting UGI participation in the management of Public Service (R. 33-35) when analyzed mean nothing more than a dwindling minority representation on the Public Service board (Appendix, pp. 29-37);

(3) The Commission's misstatements respecting UGI participation in the struggle of Public Service to secure a contract to supply the Pennsylvania Railroad with electricity for its operations in New Jersey (R. 35-39) are founded upon nothing more than McCarter's activity in enlisting the aid of all his board members and other friends on behalf of Public Service (Appendix, pp. 38-48);

(4) The Commission's description of United Engineers and Constructors, Inc. (R. 39-42), is founded upon nothing more than a joint venture into the construction business, in which McCarter forced a larger share from UGI than originally agreed upon and then withdrew as a result of the adversities of the depression of 1929 upon the construction business but with a substantial profit (Appendix, pp. 49-55);

(5) The Commission's assertion that "UGI has been particularly active throughout the years in applicant's

financing" (R. 42) is without foundation since, aside from the early years and during the first World War when on a few occasions UGI participated with others in minor financing, UGI has participated in no Public Service financing subsequent to 1919 (Appendix, pp. 55-57);

(6) The Commission's assertion that "UGI has acted for Public Service in the acquisition of utility properties" (R. 42) rests solely upon a single three-cornered transaction whereby in order to secure the Geist properties in New Jersey (which McCarter had long been attempting to secure) and in Delaware (which UGI wished to secure) a three-party deal was made necessary because Geist refused to sell either the New Jersey or Delaware properties singly (Appendix, pp. 57-59);

(7) The Commission's finding that UGI "took a very active part in connection with proposals for the reorganization of applicant's transportation subsidiaries" (R. 43) is correct only in that the single common director between UGI and Public Service participated both as a director in the latter and later as the representative of UGI-held shares (Appendix, pp. 59-60);

(8) The Commission's assertion, with reference to natural gas, that UGI and Public Service "both vigorously opposed" its introduction and "UGI took the lead in negotiations * * * on behalf of itself and" Public Service (R. 43) is without any foundation since UGI did not oppose it but on the contrary contracted for it and Public Service, upon its own studies, concluded that it was not commercially feasible (Appendix, pp. 60-62);

(9) The Commission's assertion that, as between UGI and United, "joint purchasing continued until 1939" (R. 43) is founded solely upon the use of a common subordinate purchasing agent in the earlier years and certain group discounts in connection with a very small fraction of Public Service purchases

wherein manufacturers solicited Public Service and UGI and, as an inducement, permitted the separately made purchases of each to be totaled in calculating volume discounts—a practice which was terminated under statutes not material here (Appendix, pp. 62-64); and

(10) The Commission's conclusion that Public Service reports to UGI "in considerable detail" and in a fashion "not furnished to anyone else in the same form or detail" (R. 43-44) is entirely without substance (Appendix, pp. 64-65).

It is thus clear that these ten items involve nothing more than (1) intercorporate contacts through a small minority of common directors, (2) a single joint venture into the construction business, or (3) the participation of UGI as a stockholder in matters involving all the stockholders. Even if they were all true, as they are not, any two adjacent corporations in a period of more than forty years might have done any one or more of those things without being subject to "control or controlling influence" depending upon the undisputed and governing circumstances which the Commission wholly ignores. In none of them was any control or controlling influence exercised upon Public Service.

As of the present, however, the Commission does not even go so far in the matter of relationships. It says only that UGI officials have been "consulted" on important problems and still receive reports "not furnished in the same form or detail to anyone else" (R. 45). There is even less substance to these statements than in the pointed innuendoes made in the Commission's discussion of the "historical relationship" between UGI and Public Service. Since the Commission has made no express finding of control based on the "historical" incidents, they might be passed by except for the gross distortion involved in the disarrangement of the facts so as to make it appear that there is lurid

evidence of evil and bad business morals in Public Service history. In the Appendix hereto (pp. 22-65) they are taken apart line by line and phrase by phrase and contrasted with the largely documentary and wholly undisputed record to the contrary.

B. The "historical relationship" between Public Service and United was of short duration, slight, and without significance.

The Commission devotes no findings to the advent of United into the relations of Public Service or the circumstances thereof. Its implication that there has been a "historical relationship between Public Service and * * * United over a period of 35 years" (R. 45) is a travesty.

In 1924 Messrs. Loomis and Thorne of Bonbright and Company acquired a substantial block of Public Service stock and became members of the board of Public Service (R. 231, 420). Thereafter, American Superpower Corporation was formed for the acquisition of electric utility securities and took over the Loomis and Thorne Public Service stock (R. 232, 275, 313-314, 678). Finally, in 1929 the United Corporation was formed by a group including Thorne, Loomis, and J. P. Morgan and Company, and took over the holdings of Superpower Corporation including its Public Service stock (R. 275, 304, 313-314, 421, 944, 945). Utility men from various interests served on the United board (R. 312-313), including Zimmermann of UGI (R. 944). McCarter of Public Service served as a United director from 1930 to 1934 (R. 311, 313, 1812, 1814), but took no active part (R. 417, 418).

United, of course, had no part in the organization of Public Service, which predated the former by twenty-six years. It did not, as the Commission finds, have "representation on applicant's board since 1930" (R. 33) for it had

only a single director—George H. Howard—from 1930 to 1935 (R. 1165, 1168) and he was never particularly active (R. 416-417, 710-711, 729).[18] "United representatives" did not serve "on applicant's executive committee until May 17, 1938" (R. 34), since Howard served thereon only while he was a director from 1930 to 1935 (R. 1165, 1169), and served on no other committees or in any other capacity; and no other representative of United served Public Service in any capacity whatever. Howard's directorship was therefore not "removed at the time and by reason of" the decision of this Court in the *Electric Bond & Share* case in 1938 as the Commission implies (R. 35).

The five slight and fully documented contacts of United, all of which were through Howard, in the various activities of Public Service mentioned by the Commission are as follows (Appendix, pp. 67-71):

> (1) As to the struggle by McCarter for a share in supplying electricity for the Pennsylvania railroad in New Jersey, Howard as a director of Public Service was called upon by McCarter to assist in the negotiations with Harley Clarke but participated in only one conference and made ineffectual inquiries (Appendix, pp. 67-69);
>
> (2) In the United Engineers & Constructors venture, Howard appeared on the scene as a Public Service director four years after the matter was initiated, served as a member of a committee on problems respecting a defaulting subsidiary of United Engineers, and left the picture before the venture was concluded (Appendix, p. 69);
>
> (3) Despite the Commission's assertion that United "took a very active part in connection with the proposals" for the reorganization of the Public Service

[18] Thorne and Loomis, active partners of Bonbright and Company (R. 421), had been directors of Public Service since 1924—five years before United was formed—and resigned in 1934 (R. 231, 1168).

transportation subsidiaries (R. 43), except that as a director of Public Service—long after the project was formulated and years prior to its conclusion—Howard may have participated in this highly important matter, there is no evidence of any participation by him or anyone else on behalf of United (Appendix, p. 69);

(4) Respecting the introduction of natural gas to the Atlantic seaboard, despite the Commission's finding that "United * * * was fully advised of these negotiations and discussions" (R. 43), the sole evidence is that Howard, like many other utility men, received a copy of studies made by McCarter as to the economic feasibility of bringing western natural gas to the east coast (Appendix, pp. 69-70); and

(5) As to the so-called merger of utilities on the Atlantic seaboard, with reference to which the Commission quotes without comment a very small part of a letter written by McCarter (R. 44), the fact is that McCarter had long and vigorously objected to any such project and wrote the letter only as a suggestion that, if anything were done, utilities be grouped into systems "of the Public Service type" (Appendix, pp. 70-71).

All of these intercorporate contacts were casual. Manifestly they are indicative of no control or controlling influence on the part of United.

C. The present relationship of UGI or United to Public Service activities is nil.

The Commission states positively that "there are no longer interlocking directorates" (R. 48). It asserts, however, that "UGI and United officials have still been consulted by applicant with regard to its important problems" and that McCarter has "consulted with them frequently with respect to the affairs of Public Service" (R. 45, 48), and insists that "UGI still receives detailed reports of the

applicant's operations which are not furnished in the same form or detail to anyone else" (R. 45). There is no substance to these assertions.

There were the following contacts: (1) in the final phases of perfecting the plan for the reorganization of the transportation subsidiaries, in which Drexel was hired to advise with respect to the financial and security aspects as set forth in the Appendix at pages 72-73, in September 1939 a meeting with Public Service representatives was held by Drexel at which the latter brought along Zimmermann of UGI (R. 537-540, 715) because, when previously a Public Service director, he had been active in the discussions and was still the representative of a substantial stockholder's interest (R. 1026-1027). (2) In May 1938 McCarter discussed with Zimmermann and Hopkinson a press release respecting their resignations from the board of Public Service and sent a copy to Howard of United (R. 1208-1210). (3) The next month he sent Zimmermann a note that Public Service had filed a registration statement with SEC in connection with some bonds to be sold to a syndicate headed by Morgan, Stanley & Company, to which Zimmermann replied that "this is extraordinarily cheap money" and requested a copy (R. 1416-1417). (4) Nine months later, in March, 1939, Zimmermann wrote McCarter a friendly note upon the latter's retirement as president of Public Service (R. 1162-1163). These are all the "frequent * * * consultations" the record contains. As for the "reports" which UGI receives, they are neither detailed nor withheld from other stockholders, as set forth at length in the Appendix at pages 64-65.

Conclusion.

There are here involved the vital features of one of the most important statutes of the past decade—a statute the administration of which this Court has not heretofore taken

occasion to consider. If the Holding Company Act permits the latitude and bears the construction placed upon it by the Commission, constitutional issues of grave importance are involved.

For the reasons stated in this Petition, therefore, it is respectfully submitted that this Court should exercise its authority to review the proceedings in this cause in order to determine whether or not they have been such as to require that the case be remanded for appropriate findings or such further proceedings by the Commission as the issues require.

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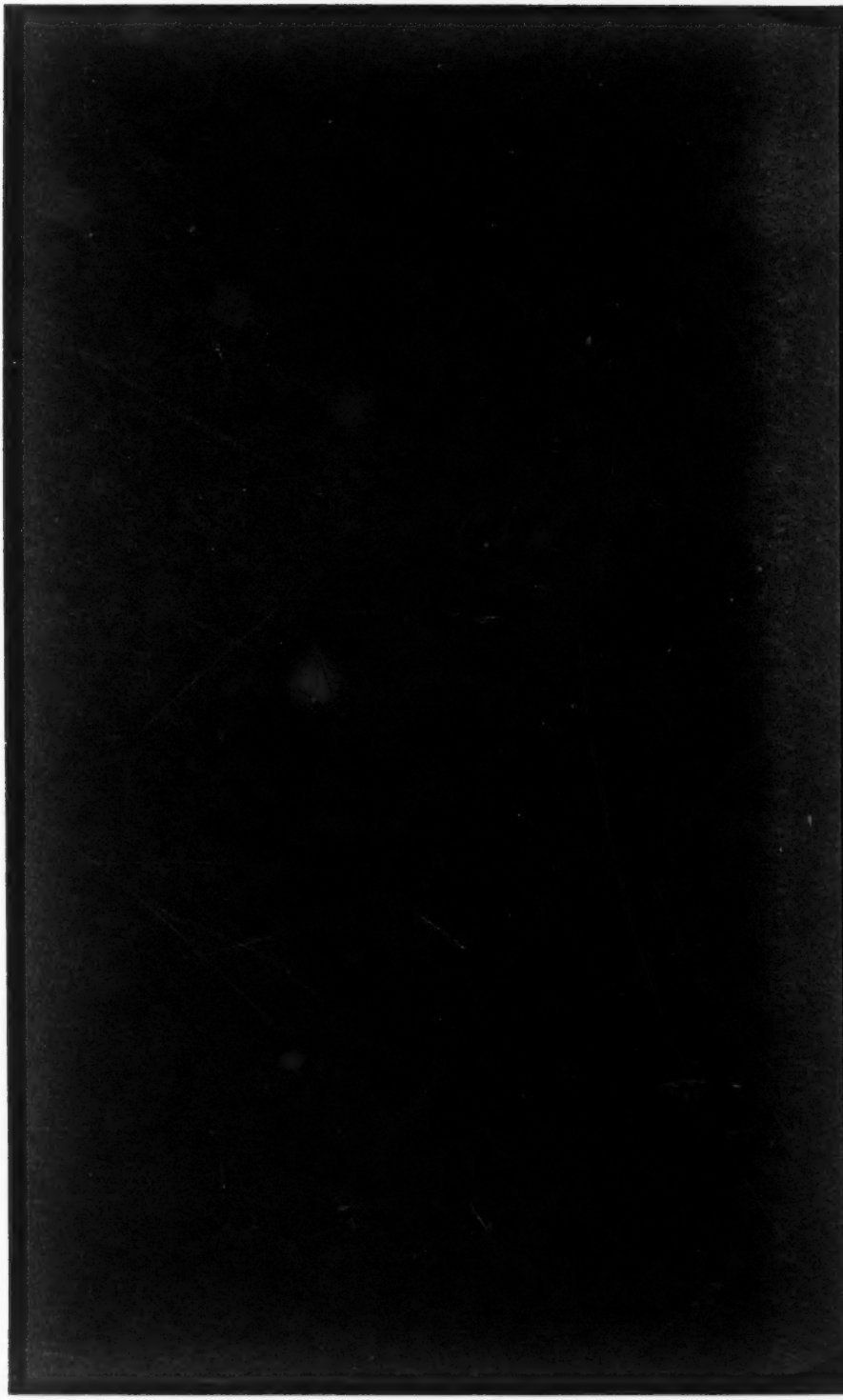
November 1942.

APPENDIX

The Appendix referred to in the foregoing Petition is separately printed and filed herewith.



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I. THE FORMATION OF PUBLIC SERVICE.

Before the turn of the century and prior to the formation of Public Service, there began in New Jersey a series of local developments and consolidations of small "mushroom" gas, traction, and electric companies (R. 212, 213). Electric development was in its infancy (R. 213). The Fidelity Union Trust Company (then the Fidelity Trust Company and hereinafter referred to as "Fidelity bank"), as the largest financial institution in New Jersey (R. 293-294), was approached to aid in financing (R. 210). Uzal McCarter was president of Fidelity bank (R. 210). His brother, Thomas N. McCarter (herein referred to as "McCarter"), was a member of the law firm which served as general counsel to the bank and was brought in to handle the legal work which resulted in the formation of the Newark Consolidated Gas Company and Essex and Hudson Gas Company in 1898 (R. 210-211). In the years which immediately followed he also handled the legal phases of the separate consolidations of new electric companies, of a number of small gas and electric companies into the South Jersey Gas, Electric & Traction Company promoted by a prominent citizen of Trenton, and of a number of companies in Bergen County into the Gas & Electric Company of Bergen County promoted by a New York investment banker (R. 213).

By 1903 McCarter had become vice president and general counsel of Fidelity bank and, in the absence of his brother and United States Senator Dryden who was first vice president, was financial as well as legal executive of the bank (R. 215), which held substantial interests in the gas, electric, and traction companies in New Jersey (R. 216). He conceived the idea of putting together various of these interests into one company (R. 216). He formulated a plan on behalf of Fidelity bank (R. 1130-1133); and a meeting of 15 or more representatives of the various interests involved was held in the office of Pennsylvania Railroad president Cassatt who had large personal interests in some of the traction companies proposed to be brought together (R. 216-217, 457-459).

The plan met with the tentative approval of that informal group (R. 217). A committee of six—of which only one, Randal Morgan, was connected with UGI—was appointed, with E. F. C. Young of Jersey City as chairman, to investigate and report back (R. 217, 1123-1124), which in turn designated a subcommittee of three consisting of John I. Waterbury, a resident of New Jersey who was president of the Manhattan Trust Company of New York City and personally interested in the traction properties (R. 218, 439); Randal Morgan, no relation to J. P. Morgan (R. 239) but second vice president and general counsel of United Gas Improvement Company (hereinafter referred to as "UGI") which had long held investments in gas and electric companies in New Jersey (R. 216-217, 218); and McCarter (R. 218). Meanwhile another plan was submitted by a Newark contractor and promoter for the consolidation of traction interests only, which was rejected (R. 218, 210, 1124, 1129). The McCarter plan, limited to New Jersey companies, was adopted in substance and, in the form of a report to the companies to be grouped into the proposed utility system (except the gas companies which were to be leased), was recommended by the full committee to the original group representing the various interests at a second meeting at Cassatt's office (R. 218-219, 1123-1124), which approved it (R. 219).

The companies, whose stock was so sought to be acquired, then finally approved the plan—the United Electric Company of New Jersey (R. 1134-1135), the Elizabeth, Plainfield and Central Jersey Railway Company (R. 1136-1137), the Jersey City, Hoboken and Paterson Street Railway Company (R. 1137-1139), the Orange and Passaic Valley Railway Company (R. 1139-1140), and the North Jersey Street Railway Company (R. 1140-1141)—and recommended it to their stockholders (R. 1142). In accordance with the original plan (R. 1130-1131), a call was issued for the deposit of stock of these companies in exchange for certificates of the new company (R. 1142-1143). Also in accordance with the original plan, the new company proceeded to acquire by lease the Essex and Hudson Gas Company, the Hudson County Gas Company, the Paterson and

Passaic Gas and Electric Company, and the South Jersey Gas, Electric and Traction Company (R. 1132-1133, 1146-1149) in which UGI had no interest (R. 224).

The new company, capitalized at ten million dollars and incorporated in New Jersey, was to be called (as it still is) Public Service Corporation of New Jersey (R. 219). McCarter was asked to resign his then positions with Fidelity bank and as Attorney General of the state to head the new enterprise, and finally accepted (R. 220). Its subsequent history, during which it developed into a $700,000,000.00 New Jersey utility system (R. 26, 246) the gross receipts of which have grown from $17,000,000 in 1904 to $140,000,000 in 1940 (R. 241, 266), is largely a story of its financial difficulties prior to and during the period of the first World War and the consolidation and reorganization of its underlying operating companies as set forth at pages 13-22 *infra*.

II. THE INTRASTATE NATURE OF PUBLIC SERVICE

Upon its organization in 1903, the Public Service system included only one tiny operating company outside the state of New Jersey, which was disposed of just as quickly as could be done (R. 218-219). Its public service is confined to three lines—transportation, gas, and electricity. It operates in approximately 500 municipalities in the state (R. 448, 738). Its gas and electricity system is integrated throughout the state, with the exception of three small so-called "system" gas companies on the east coast which might easily be interconnected if ever desirable. They are designed to serve only, and supply adequate facilities for, the resort communities in which they are located, and no reason appears at this time for connecting them with the state-wide system (R. 247, 809-810). It has a uniform, state wide, or "postage stamp" rate schedule for gas and electricity so that consumers in cities and hamlets pay the same charges (R. 449). Its electric and gas operating subsidiary serves 80% or 3,600,000 of the entire 4,100,000 population of the state; some communities it serves with gas, others with electricity, others with both; and it fur-

nishes transportation in an even greater number of communities (R. 26, 440, 842). It now operates, in lieu of its former electric railway or street car system, the largest bus system in the United States and the largest in the world except London (R. 427).

Public Service does no retail gas or electricity business outside the state (R. 444, 809) and formerly was also wholly intrastate in its transportation operations, but the building of the Holland and Lincoln tunnels and the Philadelphia-Camden bridge forced it to recognize the popular demand for through service within the metropolitan districts so that now about 20% of its transport business crosses the state lines (R. 427-428, 712).[1]

III. THE INTERNAL ORGANIZATION OF THE PUBLIC SERVICE SYSTEM.

The Public Service system—both its corporate structure and internal organization—is simple and compact.

(1) *The Public Service system.*—Public Service Corporation of New Jersey since 1909 has been solely a holding company (R. 169, 254, 255), owning all of the capital stock of its subsidiaries except for a little more than $30,000,000 of two of its electric and gas subsidiaries' preferred stock

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[1] Only as incidental to its intrastate business, it engages in the following interstate transactions: (a) In order to operate with maximum efficiency, it continuously exchanges electricity with generating companies in neighboring states in order to take advantage of surplus energy available as between the interchanging companies at different times when one needs it but the other does not (R. 370-373, 444-446, 776-778, 779-781, 855-856); and, while it varies from year to year and is likely to be reduced by new Public Service generating equipment, the net purchases of electric energy by Public Service in connection with its interchange of power amounted to only 10% in 1940 (R. 766-770, 789-790). (b) It buys coal, oil, and gas produced in other states (R. 446-447). (c) It furnishes electricity for the operation of interstate trains within parts of northern New Jersey (R. 447-448, 774); and, although a Pennsylvania company supplies all electric energy for the normal operation of that railroad in New Jersey (R. 781-782), Public Service has an agreement with the Pennsylvania company to supply the Pennsylvania Railroad with reserve or "firm emergency" power for its interstate business (R. 447-448, 770-776, 778, 782-7) at an annual charge of approximately $181,000 for this "stand by" service (R. 786-787). See pages 38-48, *infra*.

(R. 246; Applicant's Exhibit 71, not printed). Its present subsidiaries, all directly owned, are operating electric, gas, and transportation companies as follows:[2]

Public Service Corporation of New Jersey

Gas and Electric Companies:	Transportation Companies:	Other Companies:
Public Service Electric and Gas Co.[3]	Public Service Coordinated Transport[5]	Holland Land Co.[9]
County Gas Co.[4]	Public Service Interstate Transport[6]	Newark Plank Road Co.[10]
Peoples Gas Co.[4]	The Riverside and Fort Lee Ferry Co.[7]	
Atlantic City Gas Co.[4]	Yellow Cab Inc.[8]	

This organization has been the result of a gradual process of consolidation and integration over a period of forty

[2] Some of the subsidiaries listed in petitioner's application to the Commission had been merged, liquidated, and dissolved prior to the hearing (R. 169-170, 1112-1115), and others listed by the Commission in its opinion (R. 26) have been dissolved or merged since the record was closed as a part of the continuous simplification of the corporate structure of Public Service.

[3] Operates the integrated gas and electric properties in New Jersey.

[4] The three so-called "system" companies which serve seaside communities, are mainly seasonal in their business, and are not—but can readily be—physically connected with the main gas system of the Public Service Electric & Gas Company.

[5] Operates transportation solely within the state.

[6] Operates the interstate transportation through or over the interstate tunnels and bridges.

[7] A New York corporation operating a ferry crossing the Hudson and required by the laws of that state to be incorporated therein.

[8] Operates taxicabs in Newark.

[9] A land company used to hold surplus lands where condemnation or purchase requires the taking of more real estate than necessary in the utility business of the operating subsidiaries, to take tax titles where necessary to protect easements of any of the operating companies, etc.

[10] Not operating, but has not been dissolved pending a determination of asserted claim by the state in connection with the reconstruction or repair of a bridge.

years. Nearly five hundred companies, in that period, have found their way into Public Service and been eliminated by processes of purchase, merger, or dissolution; and, of the remaining, the principal ones are the two operating companies—Public Service Electric and Gas Company with its two divisions and Public Service Coordinated Transport Company with its subdivisions (R. 246-247).

(2) *The relation of Public Service Corporation to its subsidiaries.*—Public Service Corporation is the over-all management mechanism for the Public Service system (R. 254-255). The chairman of the board is the chief executive of the system, and it is he that formulates policy in conjunction with its general officers (R. 285). Agenda for meetings of the board of the Corporation for the last twenty years at least have been prepared by the Secretary on the day of the meeting and submitted to McCarter, formerly as president and now as chairman of the board, a few hours before the meeting (R. 170-176). Prior to meetings, these agenda have never been shown to directors outside the management; and no outside director has ever requested that any matter be placed upon an agenda (R. 275). Salaries of officers who are also officers of the operating companies, and the cost of maintenance of the main office building, are prorated between the Corporation and such subsidiaries (R. 689-693, 753-754).

(3) *The internal organization of the Corporation and its subsidiaries.*—Both Public Service Corporation and its operating subsidiaries are individually organized according to a substantially similar pattern, as follows: There are active boards of directors of both Public Service Corporation and its subsidiaries, of which the principal officers are directors.[11] There have been various committees,[12]

[11] McCarter is chairman of all the boards (R. 250). The boards of directors of the subsidiary companies—which since 1932 have met weekly (R. 530)—are not the same as of the Corporation, but are composed of the chief executive officers of the Corporation and the subsidiary concerned, the operating vice presidents, and one or two of the other vice presidents (R. 247, 1045-1046)—although previous to 1932 it had been the policy to have directors of the Corporation also serve as directors of the operating companies (R. 250, 529-530, 532-535). Operating prob-

including the presently important executive committees,[13] operating committees,[14] and public relations committees.[15] Its legal work is handled by a law department.[16]

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lems are handled by the subsidiary boards, but of course important questions of policy may be discussed by the board of the Corporation (R. 252-253).

[12] The names, functions, and activities of the system committees have varied during the years—there having been an executive committee for general supervision; a works committee for construction, extensions, and betterments; as well as subsidiary committees on finance, salary, and special temporary problems (R. 527-529, 1065). The subsidiaries also have had similar committees (R. 1046-1048). Records are kept of their meetings (R. 737). The present committees are all composed of residents of New Jersey who are employees or officers of the company (R. 1066). In the present organization, the executive committees are regarded as the main group, with subcommittees for operations and public relations (R. 695, 1169, 1171-1181).

[13] Though at times previously less active, the executive committee of the Corporation meets weekly, is very active and goes into more detail than, and makes recommendations to, the board of directors (R. 242-244, 245). The executive committees of the operating companies consist of the same officers and also meet weekly (R. 253).

[14] The operating committees, composed of the chairman of the executive committee as chairman and the vice presidents in charge of operation as well as those officers in charge of commercial activities or sales, report weekly to the operating subsidiary boards of directors (R. 737-738).

[15] Since the Public Service system operates in 500 municipalities and 20 counties of New Jersey, it is necessarily and vitally interested in maintaining proper relations with them and with state agencies, such as the highway department. For this purpose there are public relations committees in each operating company, presided over by the president of the company and composed of some of the vice presidents and the six executive assistants who have portions of the territory assigned to them. There is also a vice president of the Corporation in charge of public relations, who supervises the executive assistants and is a member of all the public relations committees. These committees meet weekly. At each meeting reports are made on all pending items, averaging toward 75 or 80, and a regular docket is kept. See R. 736-738, 834-835, 839.

[16] The legal work for the system is handled by a general counsel for corporation matters, a general attorney and staff for the trial of cases, and a general solicitor in charge of administrative law matters except those before the Securities & Exchange and Federal Power commissions which are handled by the general counsel—all previously reporting to the vice president in charge of law but now in fact reporting to the same individual as president of the companies (R. 695, 735-736).

IV. THE MANAGING PERSONNEL OF PUBLIC SERVICE.

The record in this case consists of three volumes of exhibits, three volumes of testimony, and in addition a large number of exhibits which have not been printed but have been certified into this Court. All of the testimony, with the exception of that of John E. Zimmermann,[17] is that of directors and general officers of Public Service.

The three principal and senior officers are McCarter as chairman of the board, Wakelee as president, and Young as chief financial officer (R. 439, 704, 931). Thomas N. McCarter, the organizer and chief executive of Public Service since its inception—a period of more than forty years—is now chairman of its board of directors.[19] Edmund

[17] John E. Zimmermann had, since 1907 or 1908, been a member of the firm of Day & Zimmermann (R. 935), which was engaged in engineering work throughout the country and had a Paris office (R. 941). It had done some valuation or appraisal work for Public Service (R. 935-936). Thereafter, in 1927, United Gas Improvement Company herein called "UGI"—which figures largely in the record and for whom it had done no work—purchased a two-thirds interest in Day & Zimmermann (R. 934, 937, 956-7). Thereafter Mr. Zimmermann became successively a member of the executive committee, president, and chairman of the board of UGI (R. 934, 956, 957-8). Early in 1929 he became a director of Public Service (R. 938) and resigned in 1938 (R. 952).

[19] R. 210 *et seq.* Born and educated in New Jersey, member of a prominent family in the State, Thomas N. McCarter has lived in or near Newark for more than seventy years (R. 209). There, beginning in 1891, he had practiced law (R. 209-210, 214) and successively held public office as state senator, judge, and attorney general (R. 214-215). He became a vice president and general counsel of the Fidelity bank of which his brother was president (R. 215). He became the first president of Public Service (R. 220), serving from 1903 until he resigned in 1939 to take the newly created position of chairman of the board of Public Service (R. 241). Of the 685 meetings of the board of directors from the organization of the corporation to the time of the hearing, he had presided at 671 of them (R. 259). He was the architect of the edifice which has become Public Service (R. 442) and, although he has constantly been called upon to serve in public and quasi-public positions (R. 292-293), his only other commercial positions are chairman of the board of Fidelity bank—the largest bank in New Jersey, antedating Public Service, in which he succeeded his brother as the dominating official—and director and member of the executive committee of the Chase National Bank (R. 293-294).

W. Wakelee, a principal officer for nearly thirty years, became president of Public Service and its subsidiaries upon Mr. McCarter's transfer to the chairmanship of the board in 1939.[20] Percy S. Young, for the past twenty years the chief financial officer of Public Service, is now the chairman of its executive committee and those of its subsidiaries.[21] T. W. Van Middlesworth is the treasurer for Public Service and its subsidiaries,[22] and William H. Feller similarly serves as secretary.[23]

Operating supervision is divided between vice presidents for transportation, electricity and gas, each of whom has his own operating staff (R. 247). Jacob T. Barron is in charge of all electric operations as vice president, and is a director in the underlying operating companies.[24] John A. Clark serves in similar capacity

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[20] R. 241-242. Mr. Wakelee has been connected with Public Service since 1914 (R. 695, 698). Previously he had been a practicing lawyer, twice a member of the New Jersey legislative assembly and leader of the majority therein during his second term, a state senator for more than ten years and president of the senate, and acting governor (R. 696-698)—in which capacities he became acquainted with state senator McCarter (R. 697, 242). He had been an attorney for one of the companies which Public Service absorbed in 1912, was continued as such by Public Service, became more closely connected with the law department in 1914, and in 1917 became vice president as well as a member of the executive committees and the boards of directors of Public Service and its subsidiaries (R. 695, 697-699).

[21] R. 461-462. He has been with Public Service since its inception, successively serving as comptroller, treasurer, and vice president in charge of finance and chairman of the finance committee (*idem.* and 242).

[22] He has been connected with Public Service since its organization—having served successively as stenographer to the superintendent of one of the predecessor companies, secretary to the treasurer of Public Service upon its formation, stock transfer agent, cashier, assistant treasurer, and treasurer since 1917 (R. 195, 208, 245).

[23] Secretary since 1937, he has been connected with the system since 1905, previously serving successively as secretary in the electric department and for twenty years as assistant secretary of Public Service (R. 134, 245).

[24] He came to Public Service in 1907 as one of a group of young engineers from the General Electric Company at Schenectady (R. 246, 757-758). He served successively in the testing laboratory, construction department of the electric division, the operating department, and the Metuchen Power Station; he then became successively chief operator

as to the gas operations of Public Service.[25] Matthew R. Boylan, in charge of transportation, has been with the Transport subsidiary and its predecessor for fifty years (R. 246). Henry P. J. Steinmetz, vice president in charge of sales, has been with the organization since 1907 (R. 246). George Barker is vice president in charge of real estate and purchases,[26] and Joseph T. Foster is his assistant in immediate charge of the detailed operation of the purchasing department.[27]

(1909), division superintendent (1910), general superintendent (1919), general manager of the electric operating department (1926), and vice president in charge of electric operations (1935—); and, since 1935, he has been a director of the operating subsidiaries (R. 757-759). His functions, as an officer and electrical engineer, include the generation and distribution of electric energy as well as electrical engineering and construction, but exclude the commercial side of the electric business of the system (R. 760-761).

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[25] He has been with Public Service since its inception, having previously been connected with certain of the gas companies which became part of the original Public Service system (R. 246); he is vice president in charge of operations and a director of Public Service Electric & Gas Company, and he is the operating head and a member of the board of directors of the so-called "system" gas companies; and his duties have to do with the manufacture and distribution of gas together with incidental engineering, construction, testing of appliances, and general management of the gas operations of Public Service (R. 803-804, 805, 810-811).

[26] A brother-in-law of McCarter and previously a clerk in Fidelity Bank, he has been with Public Service since the year of its organization, having served successively as tax insurance agent, real estate agent, since 1925 as vice president in charge of real estate, and since 1938 as a director both of the Corporation and certain of its subsidiaries; and his functions include supervision of all tax, real estate, insurance, and purchasing for the Public Service system (R. 244, 856-8, 864, 866).

[27] A life-long resident of New Jersey, he came directly from college as cadet engineer with Public Service in 1914 and has served successively in the testing laboratory and as engineering assistant, assistant engineer, and assistant to the chief engineer until transferred to the purchasing department in 1927 as assistant to the vice president in charge of purchases; and he is responsible for the handling of all the purchases of the Corporation and its subsidiaries (R. 868-870).

The legal staff consists of Wendell J. Wright as general counsel,[28] George H. Blake as vice president and general solicitor,[29] and William H. Speer as general attorney.[30] John L. O'Toole is vice president in charge of public relations.[31]

Of the recent non-officer directors (R. 932), one testified at the administrative hearing and, by consent of counsel (R. 1064-1065), the four others were permitted to submit their statements in written form (R. 1211-1219). They are: Ogden Hammond, New Jersey banker and former minister to Spain;[32] Garret A. Hobart, whose family had large holdings in Public Service and its underlying street railway companies;[33] Brigadier General Edward C. Rose;[34] Wil-

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[28] Although he did not take the stand, he tried the case for petitioner at the administrative hearing and was permitted, by consent of the parties, to make certain statements for the record. He is the former law partner of the president of Public Service (R. 245).

[29] A life-long resident of New Jersey, George H. Blake began the practice of law there in 1907; since 1910 he has been connected with Public Service, serving successively as trial attorney (1910-1921), assistant general solicitor (1921-1922), general solicitor since 1923, director since 1934, member of the executive committee since 1935, and vice president since 1936; and his duties as an officer include the charge of matters before the state Board of Public Utility Commissioners and the Interstate Commerce Commission of the United States (R. 244, 626-628, 630).

[30] He has been a life-long resident of New Jersey and classmate of McCarter at Columbia; he had been a practicing lawyer, prosecutor of the pleas, and for fifteen years a state judge; he came with Public Service as its general attorney in 1922 in charge of its trial lawyers and appellate cases, and has also been a director since 1923 (R. 244, 822-823, 827).

[31] Now also a director, he has been with Public Service since 1909, having originally been asked by McCarter to leave his position as city editor of the Newark Evening News to come with Public Service to handle commercial advertising and public relations (R. 244, 833-834, 836-837, 838).

[32] A resident of New Jersey for more than thirty years, vice president of the First National Bank of Jersey City and an officer or director in a number of other local corporations, he has been a director of Public Service since 1935 (R. 724, 8 46, 847-848).

[33] R. 1211. Becoming a director of Public Service in 1916, he had been a member of the Stock Exchange and of the partnership of Hobart and Gray of Paterson in New Jersey and remained a director and vice president of the Paterson Savings Institution. *Idem.* He is the son of United States Vice President Hobart, who was active in many of the original consolidations of New Jersey traction interests (R. 212, 932).

[34] He had been successively president of The First National Bank of Trenton and The Mechanics National Bank of Trenton which latter insti-

liam Scheerer, a substantial stockholder in Public Service from its beginning;[35] and Theodore Boettger, at the time of his appointment the president of a dye works which was the largest user of gas in New Jersey.[36]

V. THE CORPORATE HISTORY OF PUBLIC SERVICE

At the time of the formation of Public Service electric transportation appeared a promising field for development (R. 213). However, the development of the automobile and "jitney" or bus transport after 1916 caused a serious decrease in transportation business and revenue; "trolleys were going down, buses were coming up" (R. 241, 711-712). At the time of the organization of Public Service, gas and electric companies were small and scattered (R. 212, 213), requiring extensions and integration. Gas was a "sleepy" business, not yet developed by modern methods; electricity was in its commercial infancy, its enormous growth not then visualized (R. 212, 246). In subsequent history, a complete shift of the business of Public Service as shown by its annual operating revenues has occurred as follows (R. 265-267, 1182):

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tution was the second largest bank in the state, became a director of Public Service in 1931, and thereafter served also as vice president and as a member of the boards of directors and executive committees of its subsidiaries until called into service as Brigadier General commanding the 69th Field Artillery at Fort Dix (R. 1213-1215).

[35] R. 1215-1217. Resident in New Jersey since childhood and a life-long friend of McCarter and his brother, he became a director in 1912; he had been and continued as president of the Union National Bank of Newark until in 1920 it was absorbed by the Fidelity Trust Company (which thereupon changed its title to Fidelity Union Trust Company and is herein referred to as "Fidelity bank") of which McCarter's brother was president, and then became chairman of the board of Fidelity bank until 1932; he is still a director of Fidelity bank, vice president and a director of a New Jersey dairy products business, and a member of the board of managers of the Franklin Savings Institute of Newark (R. 438-439, 1215-1217).

[36] R. 723, 932. A life-long resident of New Jersey and long-time friend of Messrs. McCarter, Wakelee, and Wright, he became a director in 1931 (R. 1165, 1218-1219).

First Four Years		*1940*	
Electricity	$3,500,000	Transport	$28,320,000
Gas	5,300,000	Gas	31,000,000
Transport	8,400,000	Electricity	81,000,000

Until about 1911 transport gross revenues approximately equalled the combined gas and electric business; but now gas alone exceeds transport, and electricity is a third more than transport and gas combined (R. 266-267, 1182). Out of this general background of shifting public demand grew three principal problems—the financing of the entire enterprise particularly prior to and during the first World War, the consolidation and simplification of the gas and electric properties, and reorganization of the transport companies.

(1) *Financing.*—Upon its formation, Public Service did its own financing through the issuance of common stock, notes, and bonds (R. 253). The "panic" of 1903 occurred in the year of its organization, and was followed by the "money panic" of 1907, the money difficulties of the first World War period, and the "depression" of 1929—so that the enterprise has passed through four periods of economic crisis (R. 605-606). Of these, the first World War period was the most trying because of government directives as to service, the need for additional facilities for war plants, the extraordinarily high interest rates, the government demand for the construction of a special railroad, and the difficulties of securing fuel and supplies (R. 255, 700-703). The general officers and directors of Public Service were constantly in search of sources of funds (R. 700-701). The following tables present in brief compass the entire financing history of Public Service:

STOCKS

Until 1919 Public Service had only common stock. In 1919 it authorized an 8% $100 par preferred stock, in 1923 a 7% $100 par preferred, in 1925 a 6% $100 par preferred, and in 1928 a $5.00 no par preferred. The common stock from 1903 until 1923 was $100 par; since 1923 it has had no

par value. In 1925 the common stock was split 2 for 1 and in 1926 3 for 1.[37]

The following tables prepared from Applicant's Exhibit 57 (not printed) show the serial issues of stock and the amount received therefor:

Common Stock

Date of issue	*Number of shares*	*Amount received*[38]	*To whom sold*
June 1, 1903	100,000	$10,000,000	Underwritten by Fidelity Trust Co.[39]
May 1905	25,000	2,500,000	Stockholders pro rata—1 for 4
May to November 1905	60,194	6,019,400	Exchanged for convertible notes[40]
October to December 1909	46,306	4,630,600	Stockholders pro rata—1 for 4
October 1909	10,000	1,000,000	UGI
October 1909	2,500	250,000	John L. Kuser
November 1909	6,000	600,000	Drexel & Co.
January to March 1917	49,996	4,999,600	Stockholders pro rata—1 for 5
December 1920	4	400	To qualify directors
April 1924 to June 1925	199,767[41]	8,606,414	Stockholders pro rata—1 for 9 —pfd. and com.
November 1924 to May 1925	105,103	6,102,969	Stockholders pro rata—1 for 10—pfd. and com.
July to October 1925	132,997	8,092,556	Stockholders pro rata—1 for 10—pfd. and com.

[37] UGI purchased for cash at par 25,000 shares ($2,500,000 par) of the original issue in 1903. Since that time it has exercised its preemption right to take its pro rata share of additional issues of common stock which was sold for cash and in addition, during a financial stress in 1909, took at par 10,000 shares ($1,000,000) of preferred out of an issue of $1,850,000. For the stock—common and preferred—acquired by UGI and United see Applicant's Exhibit 56 (not printed). The acquisitions by UGI are correctly set forth in a note to the Commission's opinion (R. 32).

[38] In cash unless otherwise noted.

[39] See pp. 23, 25, *infra* for the distribution by the underwriter.

[40] The notes had been sold for cash in 1904.

[41] From and including this issue the stock was without par value.

Date of issue		*Number of shares*	*Amount received*	*To whom sold*
March to May	1926	154,558	$12,106,888	Stockholders pro rata—1 for 10—pfd. and com.
March April	1927 to 1929	576,348	19,494,655	For stock of Lessors[42]
February October	1928 to 1930	960,036	37,254,549	For convertible gold debentures[43]
March to June	1929	261,800	16,886,100	Stockholders pro rata—1 for 20
March May	1929 to 1931	10,800	864,000	For stock of County Gas Co.
July	1930	90,953	8,185,770	For stock of Atlantic City Gas Co.
July	1930	25,981	2,338,290	For stock of Peoples Gas Co.

Total shares of no par common outstanding 5,503,193, for which Public Service received $149,933,693 either in cash or property as above set forth.

8% Preferred Stock

Date of issue		*Number of shares*	*Amount received*	*To whom sold*
March 1,	1919	53,750	$ 5,375,000	UGI[44]
"	"	4,759	475,900	Fidelity Trust Co. of Philadelphia
"	"	39,250	3,925,000	Public Service Electric Co.[45]
"	"	2,241	224,100	Common stockholders[46]
May December	1919 to 1921	1,426	142,600	Exchange for convertible 7% notes
May May	1921 to 1922	18,986	1,898,600	To customers

[42] Exchanges made in connection with plan for merger of lessor electric and gas companies into Public Service Electric and Gas Company, which was enjoined by Court in 1928.

[43] Convertible debentures issued for cash in 1928.

[44] Of this amount $3,535,700 was the pro rata share of UGI. The balance of $1,839,300 was the result of it having underwritten $1,989,500 of the issue (R. 1036-1037).

[45] In satisfaction of loans in a like sum.

[46] Entire issue of $10,000,000 offered to common stockholders on a pro rata basis. The fact that few took advantage of the offer shows the difficulty of financing at that time.

Date of issue	*Number of shares*	*Amount received*	*To whom sold*
October 1921 to February 1923	29,971	$2,997,100	To customers
May 1922	73	7,300	"
May 1922	350	36,750	"
May 1922	13,689	1,368,900	To stockholders
May 1922	20,000	2,000,000	Bonbright & Co.
January to October 1923	22,651	2,265,100	General Electric Company[47]
January to October 1923	2,185	218,500	Westinghouse Elec. & Mfg. Co.[47]
June 1923	5,755	575,000	" See note [47]
March 1925	226	22,600	To employees

7% Preferred Stock

Date of issue	*Number of shares*	*Amount received*	*To whom sold*
February 1923 to December 1924	59,874	$5,987,400	To Customers
" "	2,564	256,400	To Stockholders
December 1923 to November 1924	48,906	4,890,600	To Customers
December 1923 to March 1925	716	71,600	To Stockholders
April 1924 to November 1927	69,524	6,952,400	To Customers
September 1924 to March 1926	6,170	617,000	To Employees
February 1925 to August 1925	21,000	2,100,000	Fidelity Stock & Bond Co.
March 1925 to February 1926	6,326	632,600	To Stockholders
May 1925 to December 1926	64,500	6,450,000	To Customers
September 1925 to October 1925	2,000	200,000	Fidelity Stock & Bond Co.
September 1925	7,500	750,000	Kean, Taylor & Co.

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[47] In payment for equipment furnished to Public Service Electric Co.

6% Preferred Stock

Date of issue	*Number of shares*	*Amount received*	*To whom sold*
November 1925 to December 1926	4,608	$ 460,800	To Stockholders
November 1925 to March 1927	19,604	1,960,400	To Customers
November 1925 to September 1928	187,299	18,729,900	Fidelity Stock & Bond Co.
April 1926 to April 1928	28,650	2,865,000	To Customers
October 1926 to April 1928	44,030	4,403,000	To Customers
March 1927 to March 1928	4,191	419,100	To Stockholders
April 1927	5,522	552,200	A. R. Kuser
April 1927 to May 1928	56,889	5,688,900	To Customers
June to October 1927	875	87,500	Exchange for bonds of Peoples Elevating Co.
August 1927 to July 1928	11,738	1,173,800	To Stockholders
August 1927 to March 1929	11,948	1,194,800	To Employees
October 1927 to November 1928	111,207	11,120,700	To Customers
February 1928	182,226	18,222,600	Public Service Electric & Gas Co.[48]
" 1928	9,600	965,000	To replace shares borrowed for sales to customers
April to December 1928	71,777	7,177,700	To Stockholders
March 1929	1,013	101,300	To Public Service transportation subsidiary

[48] At the time of formation of Public Service Electric and Gas Co., Public Service Corporation surrendered certain underlying securities and gave its note for approximately $20,000,000 payable in annual installments for an equal amount of bonds of the new company which were used to retire bonds of Public Service thereby releasing the stock of Public Service Electric Company and Public Service Gas Company from the lien of such bonds so that such stocks could be exchanged in the consolidation.

$5 Preferred Stock

Date of issue	*Number of shares*	*Amount received*	*To whom sold*
April 1928 to September 1929	10,124	$ 992,152	To Stockholders
September 1928 to March 1930	33,169	3,316,900	To Customers
September 1928 to April 1929	2,215	221,500	Public Service Stock & Bond Co.
" "	3,100	310,000	Fidelity Stock & Bond Co.
January 1929	1,100	110,000	Public Service transportation subsidiary
September 1929 to January 1931	42,409	4,028,855	To Customers
June 1930	150,000	14,625,000	Drexel & Co. and Bonbright & Co.
June 1930 to August 1931	19,551	1,906,222	To Customers
September 1930 to December 1931	24,891	2,426,872	" "
March to December 1931	74,557	7,279,057	To Stockholders
June 1931	150,000	14,925,000	Drexel & Co. and Bonbright & Co.
September to December 1931	7,281	728,100	To Customers

BONDS AND NOTES

In addition to the financing of Public Service Corporation by the sale of stock as above set forth, many millions of dollars have been secured by notes and bond issues as follows:

Date of Issue	*Amount*	*Kind of Obligation*	*By whom*
November 1 1904	$7,250,000	Collateral gold notes	Robt. Winthrop & Co.
May 1 1906	6,250,000	Convertible notes	See note [49]
January 1907	500,000	Demand notes	See note [50]

[49] $1,000,850 by miscellaneous subscribers, $3,125,000 by UGI, $2,124,150 by Robt. Winthrop & Co.

[50] $233,334 by Fidelity Trust Co., $100,000 by Union National Bank, $166,666 by UGI (R. 1260).

Date of Issue		*Amount*	*Kind of Obligation*	*By whom*
January 1	1908	800,000	Equipment trust certificates	E. T. Stotesbury and Fidelity Trust Co.
May 1	1908	2,225,000	First mortgage bonds	UGI
May 1	1908	3,275,000	First mortgage bonds	Fidelity Trust Co.
October 1	1909	8,000,000	General mortgage bonds	Drexel & Co. and J. P. Morgan & Co.
October 1	1910	4,000,000	Collateral notes	Drexel & Co.
October 1	1910	2,640,000	General mortgage bonds	For purchase of N. J. & H. R. R. Ry. & Ferry Co.
	1911	13,860,000	General mortgage bonds	Drexel & Co.
	1913	7,000,000	General mortgage bonds	Fidelity Trust Co.
March 2	1914	7,500,000	Collateral notes	Drexel & Co.
July 25	1914	250,000	General mortgage bonds	Fidelity Trust Co. and Clarke, Dodge & Co.
August 30	1914	250,000	General mortgage bonds	Fidelity Trust Co. and Clarke, Dodge & Co.
January 14	1916	2,500,000	Short term notes	Drexel & Co.
September 30	1916	2,000,000	Short term notes	UGI
October 31	1916	750,000	Short term notes	UGI
November 26	1917	1,600,000	4-month notes	Various—see note [51]
March 1	1919	12,500,000	Convertible notes	Drexel & Co. and Bonbright & Co.[52]
December 1	1921	10,000,000	20 year 7% bonds	Drexel & Co. and Bonbright & Co.
August 1	1924	20,000,000	Secured bonds due 1944	Drexel & Co. and Bonbright & Co.
July 7	1926	15,000,000	Secured bonds due 1944	Drexel & Co.

[51] Union National Bank, Newark $200,000, Clarke, Dodge & Co. $200,000, Red Bank Trust Co. $50,000, Newton (N. J.) Trust Co. $50,000, National City Bank of N. Y. $200.000, UGI $400,000, Drexel & Co. $500,000.

[52] Drexel & Co. and Bonbright & Co. took and paid for $12,293,000, and $207,000 was issued to stockholders on a pro rata basis.

Date of Issue	*Amount*	*Kind of Obligation*	*By whom*
February 21 1928	39,713,500	Convertible debentures	To stockholders
February 28 1928	3,676,000	Convertible debentures	Drexel & Co. and Bonbright & Co.
March 1928 to January 3 1929	299,500	Convertible debentures	Fidelity Stock & Bond Co.

Out of all these issues of securities and notes, UGI took only $8,666,666 and that prior to 1918.

(2) *The merger and simplification of electric and gas properties.*—Throughout the entire history of Public Service, the process of merger and simplification of properties has been important (R. 246-247). It was also deemed wise to segregate the traction from the electric and gas business (R. 254, 256, 1279). But, in the formation of Public Service, certain important properties had been leased for 999 years (R. 381, 714) and, although Public Service had been able to acquire some insubstantial portion of their securities (R. 381), they were good investments and difficult to acquire since dividends thereon from the rents payable by Public Service ran from 5 to 8% (R. 383). In connection with the sale of bonds in 1921, among the conditions imposed by the purchasers—Drexel and Company—was that the transportation properties and the electric and gas properties should be reorganized as soon as practical to establish a corporate structure which would simplify and facilitate financing, and that this should be done in consultation with Drexel and Company (R. 1357). In 1924 the Public Service Electric & Gas Company, which is now the electric and gas operating company for the entire system with the exception of the three small "system" companies doing seasonal business on the coast, was formed by the merger of two electric companies and one gas company (R. 384, 1745-1752). Thereafter various plans were formulated to bring in the leased companies but were unsatisfactory to their stockholders and one was blocked by injunction in 1928 at the instance of security holders upon the ground that preferred stock

offered in exchange was callable (R. 380-386, 522-524).[53] Thereafter, aided by changes in tax laws which made the proposition more attractive, Public Service secured agreement to their exchanging their guaranteed 999-year stock for 100-year bonds at the same rate of interest; and, with the approval of the New Jersey Commission and the Federal Power Commission (R. 381, 631), the long-pending absorption of the leased companies took place (R. 256-257, 258-259, 517-518, 1360-1369, 1744-1745).

(3) *The reorganization of Transport.*—"The transportation properties of [the] system * * * have been a very difficult matter to handle * * * It isn't pleasant to have an industry almost pass out on you" (R. 425). The so-called reorganization of Transport in reality was a group of problems: First there was the matter of securing state regulation so that the mushroom "jitney" service might be brought under public control and to permit older forms of traction interests to operate buses (R. 711). Secondly, there was the organization of motor transport operating subsidiaries by Public Service, followed by their merger and simplification into one intrastate and one interstate company (R. 423, 712). Thirdly, meanwhile motor carrier regulation was sought and forthcoming from Congress in the form of the Motor Carrier Act of 1935 (R. 712-713).

Finally, there was the problem of the simplification of the internal structure of the transport part of Public Service business, as had already been done for the electric and gas business (R. 713), coupled with a recapitalization to recognize the reduced value of the transportation interests. The problem was to "place Transport on its own feet so it could finance itself and its obligations be very substantially reduced" (R. 539). As McCarter wrote in 1936, "Whether we like it or not, the trolleys are on the way out, not only with us, but everywhere"; and Public Service had developed an "all service vehicle" which was "a bus

[53] It was at this time, pursuant to the plan complete consummation of which was later prevented by the injunction mentioned in the text, that UGI exchanged its stock in certain of the leased companies for common stock of Public Service Corporation—thereby increasing its holdings from 14.5% to 28.6% of the voting securities of Public Service (R. 1043).

that will run either on the old overhead trolley or under its own gas engine power" and to which the public response had been "immediate and very favorable, resulting in large increases, both gross and net" (R. 1429). To readjust to the new form of transportation, it was estimated that $38,000,000 would have to be written off against abandonments of track, street railway equipment, and some intangibles, leaving a transport investment of $80,000,000 (R. 427, 1429-1430.)[54] Although Public Service had previously acquired substantial blocks of their securities for the benefit of the system (R. 432-433), the situation was further complicated by the necessity of securing consents of shareholders of 999-year or 990-year lessors of some of the underlying properties (R. 429-432, 714). In 1921 the bankers imposed a condition in connection with a bond issue that the transportation properties should be reorganized as soon as practical (R. 1357). Throughout the 1920's and 1930's plans and suggestions had been formulated, committees discussed them, and the officers of Public Service were constantly studying the problem; and finally the major part of the plan as ultimately adopted was consummated in 1940 (R. 428, 687, 713-714, 1724-1728).

VI. THE "HISTORICAL RELATIONSHIP" BETWEEN PUBLIC SERVICE AND UGI

The following contrasts the statements of the Commission with the undisputed and largely documentary record to the contrary.

(1) Organization of Public Service

The general background of the formation of Public Service is stated at pages 1-3 *supra*. In describing the organization of Public Service, the technique of the Commission is to discuss and inflate the participation of UGI therein, ignoring other dominant interests and the facts and cir-

[54] The Commission, in passing and with an implication of poor management, states in its opinion that "in 1936 Public Service was faced with the necessity of reducing its stated capital by $38,000,000 as a result of huge losses in its investments in its transportation subsidiaries" (R. 29).

cumstances which show that UGI was merely one of a group which, because of their separate and individual holdings in some of the properties which made up the original consolidation into Public Service, participated to a greater or lesser extent.

The Commission states at the outset that (R. 31):

> Public Service was organized to combine gas, electric, and transportation properties in New Jersey by issuing its securities in exchange for such properties.

This introductory statement is correct, except that some of the important original constituents of the Public Service system were not acquired by "issuing its securities in exchange for such properties". As set forth at pages 2-3 *supra* and without dispute in the record, Public Service planned to lease gas and gas-electric properties for 900 or 999 years (R. 1132), which is important in several aspects presently noted.

The Commission incorrectly states that (R. 31):

> The provisions for its organization were presented and approved at a meeting of the UGI board on April 23, 1903.

Thus, without directly saying so, the Commission attempts to insinuate at the outset of its historical findings that UGI organized Public Service, whereas the record shows without contradiction that UGI was merely one of the many separate and unrelated interests whose consents were necessary to the consolidation of the properties (R. 1130-1133). UGI had interests in some of these companies, and its board did vote "to subscribe to its pro rata share of stock of the proposed corporation" (R. 1149); but this was no favor to Public Service, for its entire $10,000,000 issue of stock had been underwritten by Fidelity bank (R. 1130-1133); and, although UGI did take $2,500,000 of the stock at par for cash, of the remainder the Dryden-Kuser group took at least as much, Fidelity bank took an equal amount, and the balance was taken by the stockholders of the United Electric Company, the street railway companies, McCarter, and others (R. 222, 272-273). Nor were all of "the provisions

for its organization * * * presented and approved" at the UGI meeting, for only enough was stated (R. 1144-1147) to enable UGI to determine whether it would subscribe to its share in the new company and accept the offer of Fidelity bank to permit UGI to participate to the extent of 25% in the underwriting (R. 1148-1149).[55]

The Commission mistakenly finds that (R. 31):

> The plan of organization, *inter alia*, called for the issuance by the new corporation to UGI of $6,000,000 of perpetual interest-bearing certificates in exchange for the transfer by UGI of the capital stock of United Electric Company of New Jersey and the leasing of three of UGI's operating gas companies to the new corporation.

No part of this statement is accurate. UGI did not transfer "the capital stock of United Electric Company of New Jersey" to the new company because it had only half of that stock (R. 201-202). UGI did not receive $6,000,000 of the perpetuals, but only $3,001,320 (R. 202).[56] That none were issued for "the leasing of three of UGI's operating gas companies" is shown by the plan of organization and acceptances thereof (R. 1123-1149). Like other errors in findings, the error of these statements was discussed in the brief, argued before the Commission, and again called to the attention of the Commission in the petition for rehearing (R. 51 at 58) and thus illustrates the failure of the Commission to consider the evidence.

The Commission states that (R. 31):

> These leases were operative until a few years ago.

The leases referred to are those of the three gas companies controlled in 1903 by UGI, as mentioned *supra*. However

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[55] Nothing appears in the record as to whether UGI ever in fact participated in this underwriting.

[56] This was received for 100,044 out of a total of 200,000 shares of United Electric stock (R. 201-202, 1145). The Commission could have based its finding only upon its Exhibit 263 (R. 1144-1149) and, by the same approach, should have found that UGI received $20,200,000 of the perpetuals in exchange for the stocks of the street railway companies listed with the United Electric stock. Of course, nothing like that occurred.

in 1926 and 1927 UGI, pursuant to the plan for reorganization and merger heretofore discussed at pages 20-21, exchanged its stock in the lessor companies for common stock of Public Service (R. 1043). Consequently UGI had no interest in such leases after 1927, or for the past fifteen years.

The Commission inaccurately finds that (R. 31):

> UGI took 25% of the initial stock amounting to $2,614,000 and undertook to participate to the extent of an additional $2,500,000 in the underwriting of the original issue of $10,000,000.

UGI did not take its pro rata share amounting to $2,614,000 of the original issue of capital stock; and, indeed, the finding is contrary to the finding that UGI took only $2,500,000 in stock—which would be 25% of $10,000,000—made by the Commission itself in note 2 of its opinion where it states that UGI received 25,000 shares "in the course of the original transfers in 1903" (R. 32). There is no evidence that UGI ever participated in the underwriting. The erroneous statements of the Commission in this finding are apparently based upon the language and recitals of a report to, and resolution adopted by, the UGI board (R. 1144-1149), without any regard to the uncontradicted evidence as to what actually occurred. Even the UGI resolution does not authorize the exchange of the stock of United Electric Company which it owned, nor does it authorize any action with respect to the leases of the three gas companies (R. 1149).

The Commission stresses the fact that (R. 31-32):

> Thomas Dolan, president of UGI in 1903, was one of the 3 original incorporators of Public Service.

It is true that Dolan was an incorporator (R. 223, 1150) and president of UGI (R. 216), but he was personally interested in the traction interests which Public Service was acquiring whereas UGI had no interest in them whatever (R. 216). The second was Waterbury, president of the Manhattan Trust Company (R. 223, 1150), who was also personally interested in the traction companies and had

nothing to do with UGI (R. 228). And the third and last was McCarter (R. 223, 1150). In any event, it was a mere pro forma matter (R. 224).

The Commission states that (R. 32):

> Of its 24 original directors, 5 were UGI officers or employees.

So far as it goes, the statement is true. But, aside from the fact that 19 directors had no connection whatever with UGI, of the five who had such connection Randall Morgan was himself heavily and personally interested in New Jersey traction properties which had become part of Public Service (R. 228). Dolan was similarly personally interested in the traction properties (R. 216), and both held large personal interests in Public Service (R. 1228, 1243). Only Bodine (R. 226, 228), Clark (R. 226), and Lillie (R. 227) were essentially UGI representatives. On the other hand, twelve—Baird (R. 224), Barr (R. 224-225), Uzal McCarter (R. 226), Roebling (R. 226), E. F. C. Young (R. 226), Shanley (R. 227), Sterling (R. 227), Cassatt (R. 227), Dryden (R. 227), Kuser (R. 227), Thomas N. McCarter (R. 228), and Waterbury (R. 228)—were personally interested in the electric, gas, or transportation companies in New Jersey, held substantial interests in Public Service, and had no connection with UGI (R. 1834-1841). Bell (R. 226), Hammill (R. 226), Heppenheimer (R. 226), and Ward (R. 227) were New Jersey bankers, unconnected with UGI and substantially interested through stock holdings in Public Service (R. 1222, 1232, 1234, 1252). Gaddis was a New Jersey business man, unconnected with UGI (R. 226); Wanser was major general of the New Jersey National Guard and unconnected with UGI (R. 227); and Gray, also unconnected with UGI, was a New Jersey judge (R. 227). The board was designedly large to permit representation of all of those interested in the original underlying properties (R. 223). The original 24 directors of Public Service held 25,315 shares of its common stock, of which only 2,655 shares were owned by the five whom the Commission attributes to UGI; whereas the McCarters owned 3,602 shares

and Messrs. Dryden, Ward, Kuser, and Roebling owned an aggregate of 17,316 shares.[57]

The Commission misleadingly finds that (R. 32):

> UGI is the only one of the original stockholders which has maintained its holdings, except for some individuals with relatively small holdings like McCarter.

UGI has not evenly maintained its holdings throughout the years, for it did not always exercise its right to its proportionate share of new issues (R. 1042-1043). Its holdings rose from the original 25% to a high of nearly 40% in 1920; fell to a low of 14.5% in 1924; then, as a result of the reorganization to get rid of the long-term leases of the gas and electric properties in which UGI held stock of the lessor companies which along with the stock of other parties was exchanged for Public Service stock (R. 1043), rose to the 28% level in 1928 and then fell to 24.8% in 1929 (R. 1390-1391). With the further exchange of Public Service stock for that of two of the three small "system" companies in 1930, it rose to 28.7% (R. 1043) and in 1931 fell to 28.4% where it has remained (R. 1390-1391).

The Commission takes words out of their context as follows (R. 32):

> McCarter testified that no plan of the kind contemplated in the organization of Public Service could have been accomplished without the affirmative approval of UGI.

McCarter testified that, only because of the holdings of UGI in some of the properties sought to be acquired by Public Service, "no scheme of that kind could go through without the approval of the United Gas Improvement Company, who were such large holders in the gas business, and quite substantial holders in the electric business" (R. 216). The fact has no implication of dominance by UGI, any more than by any one of the other assenting interests. As

[57] For the list of directors, see R. 1164-1165; relationships of Public Service directors to UGI and other interests, R. 224-229, 1166-1168; share holdings by directors in Public Service, R. 1220-1254.

previously stated, UGI was interested in only four out of the nine companies required to consummate the plan for the organization of Public Service.

The Commission again states McCarter's words out of context (R. 32):

> He further testified that he could not have become president of Public Service against the wishes of UGI.

Asked whether he "would have been appointed President in the new organization in 1903 against the opposition of the U.G.I. representatives," McCarter stated: "I don't suppose against the opposition of any of those who were influential in forming the corporation. Not any more than the rest of them" (R. 270). It is obviously true that, in the delicate negotiations with the many and diverse interests which were required to assent to make up Public Service, no chief executive officer could have been selected against strong opposition without jeopardizing the entire project.

The Commission states only part of the facts as to McCarter's prior connections (R. 33):

> Prior to the organization of Public Service, McCarter had been employed by UGI and others in connection with the legal work involved in the consolidation of electric companies in New Jersey (R. 33).

It is true that McCarter, as a New Jersey lawyer of prominence, was retained by individuals and groups—including UGI as shareholder—in the consolidation of various types of utilities in New Jersey; but here again UGI was but one of many (R. 213, 215). There is not a word in the record to indicate that he was ever employed by UGI singly, or in any other capacity, or for any other purpose. He had been out of general practice for at least two years prior to the formation of the plan for Public Service (R. 214-215).

The Commission states that (R. 33):

> Immediately upon the organization of Public Service, its board of directors authorized the execution of a

five-year contract with UGI providing for the services of UGI's engineering and purchasing departments and a general advisory service at an annual cost of $55,000.

Since the matter of Public Service purchases is raised later and more comprehensively in the Commission's findings, discussion of purchases is deferred to pages 62-64 *infra*. The nature and circumstances of the contract for advisory service were stated without contradiction by McCarter as follows: "We had this new company upon our hands. I came to the head of it totally lacking in previous training and experience, such as public utility work, and felt the need of the best advice I could get, and the best people I knew in the business at the time were the United Gas Improvement Company of Philadelphia. * * * And they were employed for a period of five years to advise and help in every way the operation of the new company. When July 1st, 1908, came about, the expiration time of that contract, I felt I knew my way around; I had learned quite a little of the business and saw no reason for renewing the contract and it was not renewed" (R. 267). Asked if it was a "sort of management contract, where they were to supply you with officers," he replied: "Not at all. It was an advisory contract as to the details of operation of the company. It was not a management contract" (R. 267).

This completes the Commission's picture of the participation of UGI in the organization of Public Service. Not only are the statements of the Commission misleading, but no attempt is made by the Commission to disclose the undisputed story of the original conception and method of organization of the Public Service company, as set forth in subdivision I of this Appendix, or the character and affiliation of the directors as a body from the beginning to the date of hearing—all of which precludes any inference of control or controlling influence by UGI.

(2) Management of Public Service.

In attempting to suggest a controlling position on the part of UGI in the affairs of Public Service, the Commission assumes that all common or interlocking memberships

between the two corporations are to be taken as UGI domination. Thus, even McCarter is counted as a UGI man, although his heart and soul have been devoted to Public Service (R. 288). Even the Commission calls these nothing more than "interlocking relationships" (R. 35). But the question here is control, not interlocking relationships—which are dealt with by separate provisions of the Act and by other Federal and State statutes. Moreover, even these common memberships gradually disappeared during the years, have for years been eliminated entirely, and even when they did exist assumed none of the proportions which the Commission suggests.

The Commission introduces the subject thus (R. 33):

> The record discloses a substantial UGI * * * participation in key positions in the applicant's board of directors and executive committee and in the other important committees of the board, at least until 1938.

Here again the Commission speaks of "participation," but says no word of control or controlling influence. "Key positions" is a conveniently vague cliche. As shown in the following paragraphs, the "participation" at most was no more than, and strictly held to, the legitimate representation of UGI's minority interest in Public Service (R. 1192-1193).

The board of directors.—The Commission states that (R. 33):

> UGI had representation on the Public Service board from 1903 until 1938.

The statement is true but at most the question here is, How much representation?

The Commission states that (R. 33):

> UGI representatives served for many years and their tenure of office was interrupted only by death or retirement from participation in UGI management or by resignation from applicant's board because of the promulgation of the Public Utility Holding Company Act

and the decision of the Supreme Court holding the registration provisions of the Act to be constitutional.

As stated above, the Public Service board was designedly large to afford a representation to all interests in the original properties and subsequent capital stock. The original directors have been described above and, as there stated, at most only five out of twenty-four held positions in both Public Service and UGI. This participation, such as it was, steadily dwindled with the years as shown by the following table:

UGI men (R. 1166-1167)		*Size of Board* (R. 1154, 1168)		*UGI holdings* (R. 1390-1391)	
1903-1914	5	1903-1908	24	1903-1909	25+%
		1908-1917	21	1910-1918	35+%
1914-1923	4	1917-1923	18	1919-1922	39+%
				1922	37+%
1923-1929[58]	3	1923-1924	15	1923	21+%
		1924-1929	18	1924	14+%
				1925-1926	18+%
				1927-1930	24 - 28+%
1929-1930	2	1929-1934	15	1930 ——	28+%
1930-1938	1	1934 ——	12		
1938 ——	0				

Of the UGI men, it is true that Dolan (1903-1914), Lillie (1903-1925), and Morgan (1903-1926) served until they died (R. 1166); Bodine resigned in 1923, was reelected in 1925, resigned again in 1930, and "never came" to meetings (R. 1166-1167, 1192-1193); Clark (1903-1926), a gas engineer (R. 226), resigned in 1926 for unexplained reasons (R. 1166). A. W. Thompson, President of UGI, was elected in 1926 and resigned in 1929 (R. 232-233, 1166-1167) upon severance of his connection with UGI (R. 233, 234), as did Paul Thompson who had served since 1926 (R. 232, 1166-1167). The last, John E. Zimmermann who succeeded Thompson as UGI president, was elected to the Public Service Board in 1929 and resigned in 1938 (R. 233-234, 1167) at the

[58] For one month in 1925 there were four UGI men on the Public Service Board (R. 1166).

request of McCarter because of the latter's desire to comply with the spirit of the times in removing every vestige of interlocking directorates (R. 318). In the light of the origins of Public Service, this winnowing out of interlocking directors during the years can be significant of nothing but the independence and local New Jersey management of Public Service (R. 1192-1193). All in all only eight UGI men ever served on the Public Service board, while 48 different other non-UGI men have been members of the board of Public Service (R. 224, 226-228, 229-238, 1164-1165).

The Commission states that (R. 34):

> Wakelee, president of Public Service, testified that the UGI representatives on the board were active and experienced men and that their suggestions were more constructive than those of directors who had no other connection with the utility business.

President Wakelee responded "yes" to questions whether the UGI directors were active and experienced men whose suggestions were constructive as compared with directors unconnected with utilities, but went on to say: "I do not remember any major problem that was ever brought before the board or the executive committee by the representatives of UGI. If they made suggestions, as they did in the course of discussion, it was about problems and policies which we brought before the board or the executive committee. I do not remember any major policy or program of any kind that they suggested" (R. 727-728). The UGI men, aside from actual participation in board meetings, had nothing to do with minutes or agenda (R. 170-173, 174-176) and knew nothing of what was coming up except as they might learn of them at occasional luncheons in the Public Service dining room preceding meetings or at casual meetings with the president of Public Service or by correspondence (R. 275-277).

The executive committee.—The Commission finds that (R. 34):

> From 1903 to the present, there have been 27 members of the executive committee of Public Service, 12 of

whom were directors and members of the executive committee of UGI or United.

It is true that 27 different men have served on the executive committee since 1903 but, aside from the one United man (see Point II (B) of Petition) and three successive Drexel men (R. 1168; Drexel is separately treated at pages 71-73, *infra*), in all that time only 6 in all have been also UGI men (Morgan, Lillie, Clark, Bodine, A. W. Thompson, and Zimmermann; R. 1169). These have served only because they were also directors of Public Service, though two of the eight UGI men who at various times have been Public Service directors never served on the executive committee (R. 1164-1165, 1169). The membership of this committee, and the number of its members also affiliated with UGI, are as follows (R. 1169):

Years	*Number of members*	*UGI men*
1903-1925	9 to 11	3
1926-1929	9 or 10	2
1930-1938	7 to 9	1

In view of the functions of this committee, as set forth at page 7, *supra*, the finding indicates nothing more than that some of the few men, who were connected with UGI and were also Public Service directors, in the latter capacity also served at times on the Public Service executive committee.

The Commission finds that (R. 34):

> From 1930 to 1934, Public Service's executive committee consisted of nine members, of whom six were members of UGI's board and executive committee or United's board.

There was only one UGI representative on the Public Service board and executive committee—Zimmermann (R. 1169). There were other men on both boards but they did not represent UGI; McCarter represented Public Service, Howard represented United, Thorne and Loomis represented Bon-

bright and Company (R. 231), and Gates (R. 232) and Hopkinson (R. 234) represented Drexel (R. 1167-1168, 1812).

The Commission states that (R. 34):

> UGI * * * representatives served on applicant's executive committee until May 17, 1938, when John E. Zimmermann, president of UGI, and Edward Hopkinson, of Drexel & Company and a director and chairman of UGI's executive committee, resigned because of the decision in the *Electric Bond and Share* case.

It is true that Zimmermann served until 1938 when, as set forth above, he resigned as a director of Public Service. Hopkinson was a Drexel man (R. 1168) and the relations of Drexel to Public Service are treated *infra* at pages 71-73.

The Commission asserts that (R. 34):

> McCarter testified that there were so many UGI * * * men on the executive committee because "they had substantial interests in the property and most of them on the board were accomplished public utility men".

McCarter spoke some of the words quoted, but he said nothing about there being "so many" UGI men on the Public Service board and the rest of his statement was, "I always thought it best to have some of them about" (R. 319). In those days, moreover, "the Executive Committee was not very active" (R. 317).

Other committees.—The Commission asserts that (R. 34):

> UGI has also had representation throughout the years on applicant's finance committee, salary committee, works committee, and budget committee.

Here again some of the few men connected with UGI and also Public Service directors occasionally served on some of the latter's committees. Thus, there was one—Clark—on the works committee out of a membership which grew to ten before it dissolved in 1910 (R. 1171). On the finance committee, Lillie served until 1907, Morgan from 1917 to

1922, and Clark from 1923 to 1924 when the committee ceased functioning (R. 1172). On the salary committee, Dolan served in 1903 and Morgan from 1916 to 1925 (R. 1173). On the budget committee only Clark served, and then only for 1925 and 1926 (R. 1175). No UGI men served in the "cabinet" (R. 1171) or on the engineering (R. 1174), municipal and charitable contributions (R. 1174), operation (R. 1176), donation (R. 1176), real estate (R. 1177), welfare (R. 1177), or public relations (R. 1178) committees. Thus, the UGI representation was neither substantial nor was it maintained "throughout the years" as the Commission states.

Subsidiary boards.—Similarly the Commission states that (R. 34):

> UGI has also had representation throughout the years * * * on the boards of [applicant's] subsidiaries.

Here again, prior to 1931, some of the UGI men who were Public Service directors also served in similar capacity on the boards of the subsidiaries just as did some of the non-UGI directors, during the period before policy changed so that only Public Service officers served on the boards of its subsidiaries. No "outside" directors have served on the subsidiary boards since 1932 (R. 1771).

The Commission finds that (R. 34):

> From 1910, the approximate date of its organization, to 1916, Public Service Electric Company, a subsidiary of applicant, had nine members on its board, three of whom represented UGI. From 1917 to 1924 the board consisted of eight members, of whom three were UGI representatives.

These three—Morgan, Lillie, and Clark—were the three directors of Public Service who served likewise on the subsidiary board without interruption (R. 1769). Here, for the first time it may be noted, the Commission calls these men "UGI representatives," whereas at least Morgan had heavy personal interests of his own in both corpora-

tions with greater interests in Public Service than in UGI (R. 1243, 1255) and was at most merely a common or interlocking director. And of these three, only Clark served on this subsidiary's executive committee, along with nineteen different non-UGI men (R. 1770).

The Commission similarly finds that (R. 34):

> From 1917 to 1924 Public Service Gas Company, another subsidiary of applicant, had a board of seven members, two of whom represented UGI.

Here again two Public Service directors—Clark and Morgan—who were also connected with UGI served on the subsidiary board although neither they nor any other director or officer common to both served on this board prior to 1916 (R. 1767). And again, only Clark served on the executive committee of this subsidiary, along with nineteen different non-UGI men (R. 1768).

The Commission correctly states that (R. 34-35):

> In 1924 Public Service Electric and Gas Company, at present applicant's most important operating utility subsidiary, was formed as a result of the merger of Public Service Electric Company, Public Service Gas Company and United Electric Company of New Jersey, another subsidiary of Public Service.

The statement is true and is a reference to one of the principal events in the evolution and simplification of the Public Service system as set forth at pages 20-21 *supra*.

The Commission insists that (R. 35):

> From 1924 to the present [1941], there have been 25 men who have served on the board of directors of Public Service Electric and Gas Company. Of this number, 12 have been directors and members of the executive committee of UGI or directors of United.

Laying aside the reference to the single United man, who is treated in Point II(B) of the Petition, only six UGI men ever served on this board, and then only for short and

sporadic periods; Lillie served only in 1924, Morgan in 1924 and 1925, Clark in 1924-1926, Thompson in 1926-1928, Zimmermann in 1929-1931, and Bodine from 1925 to 1930; and none has served since 1931 (R. 1771). Thus the suggestion of a preponderant representation "to the present" is made up out of whole cloth.

Conclusion.—The Commission concludes that (R. 35):

> Most of these formal interlocking relationships between * * * UGI, on the one hand, and Public Service and its subsidiaries, on the other, were removed at the time and by reason of the enactment of the Public Utility Holding Company Act of 1935 and the decision of the Supreme Court in Electric Bond and Share Company v. Securities and Exchange Commission, 303 U. S. 419 (1939).

"Most of these" refers of course to all the items discussed in this section on "Management of Public Service" and as such is a patent distortion of fact. As set forth above, UGI representation on the Public Service board dwindled from 5 in 1914 to 1 after 1930; and it was only the members of this dwindling minority who were also occasionally and sporadically members of committees and subsidiary boards in the Public Service system. Since 1930 there has been only one UGI man on the Public Service executive committee and none since 1938. Since 1926 none has been on any other Public Service system committee. Since 1931 none has served on the boards of any subsidiary of Public Service. Neither 1935 nor 1938, to which the Commission refers in this finding, is therefore significant in the dissolution of the "interlocking relationships" which the Commission mentions except that the latter year marks the severance of the last common director. And the foregoing is all of the "formal" relationships that the Commission can find in a history of forty years.

(3) UGI'S participation in Public Service affairs

In the attempt to put flesh and blood on the wisps and shreds which it has attempted to distort into a basis for

finding control in the management of Public Service, the Commission refers to two "highly interesting instances" not of control or controlling influence but merely of "UGI participation in the applicant's affairs" (R. 35). After spending seven pages on these, laboring to make them appear instances of evil (R. 35-42), it finds occasion to similarly distort ten further instances (R. 42-44, 46 n. 6). These twelve instances, which the Commission has thought worthy of findings, are treated seriatim in the following points:

(a) *Pennsylvania Railroad electrification*

The evidence is documentary and undisputed (R. 1593-1690).

The Commission states that (R. 35):

> The active participation by * * * UGI in applicant's attempts to secure a contract to supply power to the Pennsylvania Railroad furnishes an interesting and significant illustration of the relationship between the companies.

It may be conceded that this episode is significant, but significant of the power of petitioner to enlist UGI in its service rather than vice versa. It is the story, moreover, of petitioner's attempt to secure contracts to supply power to the railroad for operations in New Jersey alone and as against a wholly owned subsidiary of UGI in Pennsylvania which already had such a contract. It proves not domination by UGI but vigor and independence in Public Service.

The Commission asserts that (R. 35-36):

> In 1927 the Pennsylvania Railroad decided to electrify its lines and proposed to construct its own power plant in Philadelphia, in the belief that it could generate power more cheaply than it could buy it. * * * McCarter and officials of UGI * * * were concerned lest such construction might cause Public Service to lose any opportunity it might otherwise have to sell power to the Railroad. Public Service and UGI were successful in blocking the Railroad's proposal to erect its own plant.

The finding is completely misleading. In the early part of 1927—a year before UGI acquired control of Philadelphia Electric Company in December 1927 (R. 347)—the Pennsylvania Railroad was making plans for the electrification of its main line from New York to Harrisburg and Washington (R. 287). In the Railroad's consideration of possible sources of electric power there appeared to be several possibilities: (1) the construction of a central power station in partnership with the Philadelphia Electric Company, Philadelphia Rapid Transit, and UGI (R. 1600); (2) the construction of a central power plant to furnish power exclusively to the Railroad (R. 1600); (3) the construction by the railroad of its own power plant or plants (R. 1595-1598); or (4) the purchase of power by the railroad from the several utilities along the line (R. 288, 1593-1599, 1602-1603). The proposal that the railroad build its own power plant was, of course, a strong bargaining point on the part of the Railroad in its negotiations with the utility companies (R. 1605).

In July 1927 negotiations were had between Public Service and the Railroad for the sale of power required for the New Jersey division of the Railroad (R. 1603). Also, the Philadelphia Electric Company—not then controlled by UGI—was negotiating (R. 1603). On July 21, 1927, Philadelphia Electric entered into a contract with the Railroad for the supply of power (R. 1678). This contract required Philadelphia Electric to furnish the Railroad any amount of power the Railroad could use wherever it wished and with a descending rate per kilowatt or load factor (R. 287, 345, 1009). The Railroad under that contract could have taken the power all the way in to New York (R. 1009).

There is not a scrap of evidence to justify the statement of the Commission that "Public Service and UGI were successful in blocking the Railroad's proposal to erect its own plant." The fact is that, when the Railroad succeeded in getting a satisfactory contract for practically unlimited power from Philadelphia Electric, it abandoned any idea of building its own plant. That the great, powerful, and independent Pennsylvania Railroad could not be, and was not, bullied by these utilities is obvious. What it did was drive a hard bargain, as will appear from the following para-

graphs. Moreover, so far as production of power by the Railroad itself is concerned, not only in this instance but in other and subsequent ones it did not undertake to produce its own power but purchased it from other utilities—from all except Public Service (R. 1684-1685). In 1938 the President of the Railroad wrote, "Power production is not part of our electrification * * * We are people who have put the entire source of our power up to the power producers on our line * * *" (R. 1688).[59]

The Commission correctly states that (R. 36):

> In negotiations which continued from the latter part of 1927 to the summer of 1930, McCarter exerted every effort to obtain a contract with the Railroad to furnish power for the Railroad's lines in New Jersey.

That McCarter, and McCarter alone, did so is apparent on almost every page of the record dealing with this situation (R. 289-290, 344). Not only did he call to his aid all of the Public Service directors and other friends as shown in the following paragraphs, but he took such measures as diverting Public Service coal traffic—which amounted to more than $3,000,000.00 annually—from the Pennsylvania Railroad (R. 289-290). Zimmermann of UGI, who was then a Public Service director, did not approve of this action (R. 290).

The Commission states that (R. 35, 36):

> The matter was the subject of considerable discussion between McCarter and officials of UGI * * * During

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[59] It should also be noted that the Railroad was not merely in search of power for its own use, but was also marketing power. Informed that the Railroad was doing so in New Jersey, "taking current from Philadelphia to use in connection with their electrified line to Atlantic City and at the latter point * * * selling current to the Atlantic City railways" (R. 1613), McCarter replied: "I do not agree that the Pennsylvania Railroad should buy current and transmit it east or west into the territory of other carriers, and I shall resist it with all the force that I can. I want to make this trade with the Pennsylvania Railroad, but I do not propose to be bullied or cajoled into an uneconomical one" (R. 1615).

> the entire period of these negotiations, McCarter was actively assisted by UGI. Although Public Service had an engineering staff of its own, McCarter employed The U.G.I. Contracting Company, then the engineering subsidiary of UGI, to study the matter and prepare proposals as to rates and to advise him with respect to negotiations with the Railroad. UGI officials actively participated in the negotiations and were at all times kept advised of the progress made. Even after UGI acquired control of the Philadelphia Electric Company in December 1927—and even though Philadelphia Electric and Public Service were, in effect, in competition for the Railroad's business—UGI continued to assist the applicant in the attempt to secure the contract.

When McCarter first learned of the electrification project, he wrote Arthur Thompson, a Public Service director at that time and president of UGI, to secure information (R. 1593-1603). Thompson was also a director of the Pennsylvania Railroad (R. 348). After the Railroad—upon the execution of its contract with Philadelphia Electric under date of July 21, 1927—had abandoned all plans, if it ever had any, for the construction of a joint central station or its own power plant, it was apparent that if Public Service was to secure the contract for the power to be used in New Jersey it would have to meet substantially the same rates as payable under the Philadelphia Electric contract.

By October 1927 Public Service arrived at what it thought was a proper rate (R. 1610). Because the UGI engineering subsidiary (described in the next subdivision *infra*) had previously prepared considerable data on the various subjects involved in railroad electrification, had accumulated comparisons of recent costs of construction, and had in parallel columns considerable data (R. 1607), McCarter was authorized by the board of Public Service Electric and Gas Company to employ the UGI Contracting Company as consulting engineers (R. 1610-1611). For such services it received $2,326.94 (R. 468-469, 648-649). But, far from ignoring the engineering staff of Public Service, the latter actually did the work and negotiating for Public

Service and only collaterally used the data supplied by the UGI subsidiary (R. 796, 1628-1631). Indeed, the record is plain that the Public Service engineering staff took no dictation from the UGI engineers (R. 1612-1614), and the latter were instructed to "follow what the Public Service Corporation wants" (R. 1613, 1614) and in fact merely submitted their studies and comments (R. 1616-1622). It should be noted in this connection that on December 5, 1927, the UGI Contracting Company sent from Philadelphia to Newark its "Comments on Proposed Sale of Power by Public Service to P.R.R." (R. 1616) which was acknowledged on December 7, 1927 (R. 1622); but on December 3, 1927, the engineering department of Public Service had developed a definite rate proposal which had been transmitted by McCarter to the Railroad on December 5, 1927 (R. 1628), which was the same day that the UGI engineering subsidiary mailed its comments to Public Service. UGI, however, was further drawn into the picture not as an aide to Public Service but as a third party when, in December 1927 (R. 347, 467), it acquired Philadelphia Electric Company which was already under contract with the Railroad and from which the Railroad ultimately took most of its power needs, as set forth more fully below.

The Commission states that (R. 36):

> During the course of the negotiations, Eastern New Jersey Power Company, dominated by Harley Clarke and unaffiliated with UGI or Public Service, entered into competition for the contract and offered a rate which was very much lower than the offer made by Public Service. McCarter regarded Eastern New Jersey Power and Clarke as interlopers and, with the active assistance of UGI * * * he attempted to eliminate them by every possible means. McCarter knew that the Chase National Bank was interested in some of Clarke's ventures and he wrote Albert Wiggin, then president of Chase National, requesting him not to finance this project of Clarke's, and stated that he believed a word from Wiggin would settle the entire matter. Apparently, this request did not have the de-

> sired effect and with the help of UGI * * * McCarter even attempted to buy up Clarke's property, but the attempt was unsuccessful.

Except that, antedating the Railroad matter, McCarter sought to buy out Clarke, there is no substance to this finding. In 1928 McCarter, then a director of the Chase National Bank (R. 294), wrote Wiggin, president of the bank, pointing out that the Eastern New Jersey Power Company, controlled by Clarke, was sandwiched in between Public Service and New Jersey Central Power & Light Company controlled by Insull; giving it as his opinion that ultimately this property must go to one interest or the other; and asking the good offices of Wiggin to assist Public Service in acquiring it, as he did "not want to wake up some day and find that Insull has gathered it in" (R. 1627-1628). Clarke did not appear in the Railroad electrification matter until late in 1929 or later. As late as November 4, 1929, the engineers for the Railroad made no mention of Clarke (R. 1630). Shortly prior to January 17, 1930, Clarke had entered the picture and McCarter and Howard conferred with Clarke and Dodge about Clarke's attempt to get the Railroad business (R. 1632). On that date McCarter again wrote Wiggin asking the latter's help in either securing an arbitration or a purchase of the Clarke property (R. 1632-1645). He did not ask the bank, as the Commission would have it, "not to finance this project of Clarke's" (R. 36); he suspected contrary influences at work in the Chase Securities Company, an affiliate of the bank (R. 1659); and he got no tangible assistance from the bank. Though McCarter, in his efforts to enlist their aid, kept Thompson (until he resigned from both Public Service and UGI) and Zimmermann advised of his activities (R. 1625, 1626, 1636), the only "active" participation or "help" of UGI in this matter was in the matter of Clarke's proposal for a three-cornered trade between him, UGI, and Public Service whereby Clarke might dispose of his New Jersey properties to Public Service in return for some outlying property of UGI—which came to nothing (R. 1633, 1637, 1639, 1641, 1645, 1646-1647).

The Commission states that (R. 37):

> McCarter finally realized that Public Service could not meet the rates of Philadelphia Electric and Eastern New Jersey Power and that, at most, it could obtain only certain emergency service business from the Railroad. In June 1930 Public Service withdrew from the competition for the contract. Before this time, Philadelphia Electric had sold some power to the Railroad in Philadelphia but had not actively competed for any additional business. However, in June 1930, Allegaert of Public Service * * * stated that he had telephoned the Philadelphia Electric people and told them that since it was apparent that "Public Service was out of the picture," Philadelphia Electric should at once attempt to obtain this business. Allegaert further stated that he told Taylor of Philadelphia Electric that the emergency service business, and Public Service's participation in the business to that extent, could be settled later "since we were one and the same interest, further that even opposing interests would be able to get together on such a proposition. I told him to go ahead and get the business and that I would stand behind him."

It is true that, because of freight rates on coal and higher taxation, McCarter could not meet the rates already contracted for by Philadelphia Electric and offered by Clarke as well (R. 289, 1638, 1648). But the necessity of securing at least emergency service or auxiliary power from Public Service had been pressed (R. 356, 1010, 1648-1649, 1665-1666). Philadelphia Electric had not merely "sold some power" as the Commission states, but was under contract to supply *all* the power the Railroad might call for, at a very low rate—so that it was not, as the Commission suggests, called upon to compete "for any additional business" (R. 287, 288, 339, 348, 349, 1009). When it became apparent that Public Service could not offer a better rate, and when the Railroad was apparently undecided whether to take its power from Clarke or from Philadel-

phia Electric under the existing contract supplemented by an agreement whereby Philadelphia Electric would provide standby and emergency power supplied by Public Service, of course the latter urged on and cooperated with Philadelphia Electric which, as stated by the Commission, had now been acquired by UGI. When Allegaert made his memo that he had urged Philadelphia Electric to "get this business" (R. 1667), the issue was either Clarke with no share for Public Service or Philadelphia Electric and a share for Public Service (R. 1662-1666). Philadelphia Electric and Public Service now had "one and the same interest" in the matter, as Allegaert stated (R. 1667), because the arrangement contemplated a three-cornered participation between the Railroad on one hand and Public Service and Philadelphia Electric on the other—as was ultimately carried out (R. 1681-1684).

The Commission finds that (R. 37):

> The Pennsylvania electrification negotiations reached a climax in the latter part of June 1930, when Zimmermann, president of UGI, and McCarter were in California. Charles Day, a director and member of UGI's executive committee from 1927 until his death in 1931, and Thomas S. Gates, a member of UGI's executive committee from 1927 to the present (both of whom had been active in the matter and had been kept completely informed as to the progress of all of McCarter's negotiations), represented UGI, Philadelphia Electric, and Public Service in the final conferences with Atterbury, then president of the Pennsylvania Railroad. They received Atterbury's "final terms" and immediately telegraphed Zimmermann, urging him to reach a decision with McCarter. They stated that delay might give "the independent" (referring to Eastern New Jersey Power Company) an opportunity to make a more favorable proposition than Zimmermann and McCarter could meet. Zimmermann and McCarter made a joint decision to accept these terms, apparently on behalf of UGI, Philadelphia Electric, and Public Service.

On June 17, the date of the communications referred to by the Commission, McCarter and Zimmermann were in California attending the convention of the National Electric Light Association (R. 1013). By this stage, the major interest was that of Philadelphia Electric (now wholly owned by UGI), since it was to supply the power and Public Service was merely to agree to a standby arrangement. There is nothing to support the assertions that Day or Gates "represented" Public Service in their conferences with Atterbury, as the Commission would have it, or that "McCarter made a joint decision * * * on behalf of UGI, Philadelphia Electric, and Public Service" (R. 38). It was a "joint decision" only insofar as "it had to be" since both companies were involved (R. 1014). Long telegrams were sent to Zimmermann (R. 1662-1666) stating that Atterbury wanted to reach a decision, that, "since you and McCarter are together, we have no alternative but to place the whole situation before you," and that "you and McCarter must decide whether you can accept Atterbury's terms or not" (R. 1663-1664). The proposition was wired to them *in extenso* (R. 1665-1666), and they agreed by telephone (R. 1666). McCarter obviously acted for Public Service and Zimmermann for UGI's subsidiary Philadelphia Electric.

The Commission finds that (R. 38):

> The contract which was finally executed provided that the Railroad would take all its power from Philadelphia Electric, apparently at the same rate as had been offered by Eastern New Jersey Power. However, the Railroad also agreed to pay an additional $100,000 a year to Philadelphia Electric, which was to arrange with Public Service for the installation of a 25,000 kilowatt frequency changer at the Metuchen switching station for firm emergency power. This $100,000, or such part thereof as was agreed upon was fair, would be turned over to Public Service by Philadelphia Electric.

The finding is true, except that it was merely a "supplementary" agreement to that of July 21, 1927, previously

signed by Philadelphia Electric, without change of rate or otherwise except for the additional provision for emergency power to be transmitted by Public Service (R. 1678-1680). The collateral contract between Public Service and Philadelphia Electric provided only that, in case of a breakdown on the Railroad's line, Public Service would furnish the necessary emergency service (R. 1681-1682). The Railroad simply "fell back on the old contract which had been made previously with the Philadelphia Electric Company" (R. 287-288, 340, 345, 348-349, 708-709, 1009) plus this additional provision for emergency service.

The Commission concludes that (R. 38-39):

> It is clear, therefore, that in this extremely important matter * * * UGI officials advised McCarter and shaped the course of his conduct of negotiations with the Railroad; that important decisions by Public Service were made jointly with UGI * * * directors and officers; and that the pressure exerted on the Railroad by UGI and United in applicant's behalf was such that the Railroad agreed to pay $100,000 a year more for power than would have been necessary had it purchased the power from applicant's competitor.

Each of these conclusions is without any support whatever in the evidence. While it may be granted that "UGI officials advised", or more properly "advised with", McCarter, they certainly did not "shape the course of his conduct of negotiations". Nor were important decisions "made jointly" except so far as McCarter and Zimmermann happened to be at the same convention when the time for final acceptance came, as set forth above. The final statement that the Railroad was forced to pay an additional $100,000 for nothing is completely false, since with it the Railroad bought facilities and contracts for emergency power as shown by the contracts (R. 1678-1684) in accordance with the recommendations of the Railroad's own consulting engineers (R. 1665-1666), the written negotiations at the time (R. 1648-1649, 1662-1663), and the testimony (R. 289, 356, 1010). Public Service received only reimbursement for its expense of installation and maintenance of the necessary facilities for

emergency service, and agreed that any emergency power which might actually be taken should be reimbursed in kind (R. 1681-1682, and see the remainder of Applicant's Exhibit 81 not printed).

As an addendum the Commission states that (R. 39):

> Even in October 1938, when UGI no longer had representation on applicant's board or executive committee, McCarter conferred with Gates and Clement, then president of the Pennsylvania Railroad, about McCarter's complaints that he was not obtaining sufficient business from the Railroad, and McCarter furnished Gates with copies of his correspondence with Clement and advised him in detail of all negotiations.

In the first place, these interchanges took place in 1938 (R. 1684-1690), eight years after the Pennsylvania electrification matter was settled in 1930 (R. 37, 1663-1666) and at least six years after the final contracts had been signed (R. 1678). Clement, who had become president of the Railroad, was related to McCarter by marriage (R. 290). Gates was a Drexel man, as set forth at pages 71-72 *infra*, who was also a UGI director; he was a prominent citizen of Pennsylvania, had long known McCarter intimately, was President of the University of Pennsylvania and a director of the Pennsylvania Railroad (R. 262, 1690), and was now invited by Clement to join him in a conference with McCarter (R. 1688-1690). The relations of the Pennsylvania Railroad to Public Service, since the loss of the electrification contract by Public Service in 1930, had "always been a sore subject to [McCarter] as President of Public Service" (R. 1684) and his complaint in 1938 was that he still got none of the Railroad business even in purely local matters (R. 1684-1686) and never seemed "to be getting anywhere" with the Railroad (R. 1687). He finally got some of the local business (R. 290).

All that the entire Pennsylvania Railroad episode indicates is that McCarter fought hard, but lost the battle because of a differential in taxes and freight rates which Public Service could not meet (R. 289, 1648).

(b) *United Engineers & Constructors, Inc.*

In the bright year 1928 Public Service and UGI embarked upon a joint venture in the engineering and construction business, for which McCarter lost stomach after the debacle of 1929 made such business precarious. In his words, "We all thought we knew what we were doing, but of course none of us anticipated a panic in 1929 and succeeding years" (R. 394). The Commission labors this incident through three pages of its findings (R. 39-42) but, rather than showing any control by UGI, the uncontradicted record demonstrates the independent power of Public Service to force an upward revision of its share. The error of the findings, upon the undisputed and documentary record, may be pointed out briefly as follows:

In January 1927 Koppers Corporation suggested "some kind of an alliance" with UGI's contracting subsidiaries, which led Thompson, then UGI president, to suggest that such a venture with Public Service was already under way (R. 1446). After a discussion with McCarter the following spring, Paul Thompson (president of the UGI Contracting Company) wrote McCarter in June urging the joint venture as a means of reducing overhead, securing the advantages of a consolidated staff, expanding the business of the construction subsidiaries of each, and pooling their influence in order to obtain new business (R. 964, 965, 1447-1449). McCarter expressed to Young, the Public Service vice president in charge of finance, his reaction was against "selling out of the [Public Service] Production Company to The U.G.I. Contracting Company rather than a combination of the two to the advantage of both" (R. 1451) and suggested to Paul Thompson an alternative of a consolidation (R. 1452-1453). UGI accepted McCarter's alternative and the discussions continued during the following fall when Zimmermann—then not directly connected with either UGI or Public Service—presented a memorandum on the whole question (R. 1454-1467). Figures relating to the business of each company were interchanged (R. 1466-1467). On December 30, 1927, McCarter suggested a tentative basis for the consolidation (R. 1468). One of the problems was to maintain as nearly as possible the net earnings accruing

to Public Service in the sum of $1,000,000 from its own engineering subsidiary (R. 1469-1470). By January 6, 1928, the matter was "pretty well in the air" and McCarter suggested a meeting (R. 1473) which was held January 11, 1930, and attended by McCarter, Thompson, and Charles Day of Day & Zimmermann (R. 1474-1475). At that meeting the plan of organization was agreed upon (R. 1474-1475). Thus there was no reluctant "acquiescence" on the part of McCarter, as the Commission suggests in the attempt to show UGI pressure (R. 39).

The consolidation of the UGI and Public Service subsidiaries accordingly took place, with the addition of the independent Dwight P. Robinson & Company, Inc. (R. 1479-1485), as the Commission finds (R. 39). Public Service exchanged its $1,000,000 of stock in the Public Service Production Company and paid $1,280,000 in cash for its interest in United Engineers & Constructors (R. 535). The capital stock of Public Service Construction Company had been paid for by Public Service in cash at par (R. 391). It was anticipated that the new concern would profit from the anticipated electrification of steam railroads (R. 1461) and in the construction of large buildings (R. 1462). The work which United Engineers subsequently did for outsiders was very much greater in volume of dollars than that done for its affiliated companies (R. 966).

When he got to studying the figures on the last working day of 1927, McCarter suggested a formula for the division of interests in the new concern and, as a "rough computation", calculated that Public Service and UGI should both have 45% and Day & Zimmermann 10%—but stated that, "should we embark upon the realm of exact figuring, I think we would find ourselves in a maze" (R. 1468). This was far from a "request" by him for such a division of interest, as the Commission suggests (R. 39). A few days later Thompson wrote agreeing with McCarter as to the general principle suggested by the latter for determining the several interests (R. 1471-1472). It was at this point that McCarter replied that this still left "the matter pretty well in the air" and pressed for an immediate meeting (R. 1473). Five days later a memorandum of understand-

ing was signed which provided for a division as follows: Public Service, 40%; UGI, 50%; and Day & Zimmermann, 10% (R. 1474-1475). There was thus nothing of the surprise which the Commission implies in its finding (R. 39). The new company was incorporated under the laws of Delaware on January 31, 1928 (R. 1485) and in December of that year Young of Public Service pointed out a discrepancy in the estimates upon which the interests were figured (R. 1488-1489) and McCarter demanded an adjustment, rejected a 45-, 45-, 10% arrangement such as he himself had first calculated, and secured a full 50% interest for Public Service (R. 395, 396, 396-397, 1490-1498). Public Service "never asked for any more and never expected to get any more than [it] thought was fair" (R. 598-603). There were thus no "further negotiations" as the Commission suggests (R. 40), but a settlement in conformity with McCarter's original formula [60]—and even if these be considered as negotiations they merely indicate the independent bargaining power of Public Service as against UGI.

In the depression year 1931 it became apparent that some of the real estate properties of Dwight P. Robinson Company, Inc., were at least shaky. "When the panic came on * * * apartment houses and * * * hotels and * * * other buildings went out the window and plunged that company almost into bankruptcy" (R. 393). "That real estate, like all other real estate, just went out from

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[60] There was thus no occasion for the "written report or certification of financial statements" which the Commission intimates should have been required by Public Service (R. 40 n. 3), and in addition the documentary record is uncontradicted that from the very beginning McCarter doubted the figures on proportionate earnings submitted by UGI (R. 1451, 1452-1453). He testified that "the balance sheet of the Dwight P. Robinson Company showed the facts" as to that company (R. 394). He of course knew about the detail of his own Public Service Production Company. As to the UGI engineering subsidiaries, he "had been for many years a director of the UGI and * * * knew, generally speaking, what their activities were" (R. 395); and "Mr. Young [vice president in charge of Public Service finance] satisfied himself entirely as to the financial figures * * * His department knew exactly what we were doing" (R. 396). Young testified that "we went into it very thoroughly. * * * Went into their books * * * and their statements and past history" (R. 597).

under" (R. 394; see also R. 970). McCarter thereupon wrote a truculent memorandum charging "careless and improper management" in the Robinson Company (R. 1500-1503) as the Commission sets forth (R. 40). These, he felt, were at least "moral * * * obligations" of Public Service and UGI as "the owners of this Company" (R. 1501). A committee was appointed by the executive committee of United Engineers & Constructors to act on major problems arising out of the Dwight P. Robinson Company situation—consisting of Young of Public Service, Howard of United and also a director of Public Service, and Zimmermann of UGI (R. 1506-1507). The committee decided to pay all obligations (R. 1506). Loans were secured for the items in default (R. 1503-1505). It is reported by a third party that McCarter expressed irritation at not having known about one of these loans—but the same statement indicates that Young, his vice president in charge of finance, had been fully advised (R. 1504) and in fact was the Public Service member of the committee which decided to pay all obligations rather than risk receiverships (R. 1506-1507). Thus McCarter was not "completely unaware" of these loans as the Commission states (R. 40), and Public Service was represented in all.

In the fall of 1931 the future ownership of United Engineers & Constructors was under consideration (R. 1508-1510) and in December of that year McCarter, countering a suggestion made by Zimmermann (R. 1512), made some suggestion with respect to UGI acquiring the stock owned by Public Service in United Engineers (R. 1510). Zimmermann then wrote that he was sorry but could not go along and explained at length his reasons (R. 1511-1513). McCarter in turn replied that he too regretted their inability to agree but that he and his associates in Public Service did not take to the Zimmermann proposal and thought "we had better go along as we are on a 50-50 basis" (R. 1513). Thus McCarter did not "abandon" anything he had originated but merely refused to accept a proposal made by Zimmermann and concluded to continue Public Service in the venture (R. 1513). Nor did Zimmermann demand, as the Commission would have it, that Public

Service "share the * * * risks of possible legislation which would prohibit a holding company from engaging in construction and engineering work for its subsidiaries" (R. 41). What he said was that UGI could not acquire the Public Service half and become the sole owner of United Constructors since such ownership would be subject to the risk of such possible legislation (R. 1512-1513). In short, it was a poor investment for UGI to make.

Meanwhile, McCarter also wrote asking lists and details of the management of United Constructors (R. 1508) including the "supervisory force, with a complete list of salaries"—which was promptly furnished (R. 1513-1515). McCarter concluded to make no "substantial suggestions or changes at the present time" but asked that the general auditor of Public Service go on the committee in charge of the Robinson Company affairs (R. 1516) which was promptly done (R. 1517). It is thus not true, as the Commission finds, that Public Service "had very little share in the management" (R. 40) or that McCarter "sought to obtain greater representation in the management" (R. 41). McCarter and Young of Public Service were on the board of nine directors and McCarter was one of the three-man executive committee (R. 1515, 1529). Public Service sought no greater representation. In the words of McCarter, "It was a matter of convenience. * * * Meetings were held once a month, and Mr. Young and I used to go * * * to them * * * and that seemed * * * all that was required. They offered, time and time again, to let us have 50% of the directors, and I never saw the necessity for it" (R. 398).

It is true, as the Commission finds, that in 1932 McCarter suggested that the loans of Public Service and UGI to United Constructors be converted into stock (R. 1518), but Zimmermann demurred for UGI on the ground that it would inflate the UGI investment, might have the result of resuming dividends, but would not yield any more in actual returns, and would be unwise because "the day is not very distant when both of us may have to decide to part with the United Engineers * * * and it would therefore be

most unwise to keep on increasing this investment'' (R. 1519). McCarter agreed (R. 1520).

The eventuality suggested by Zimmermann occurred with the passage and validation of the Public Utility Holding Company Act, as the Commission itself finds (R. 42);[61] and the ownership of Public Service and UGI was eliminated by the cancellation of part of their stock, the sale of the remainder to the managing officers of United Constructors, and the receipt of a million dollars in its debentures each by Public Service and UGI (R. 1522-1526).

Between 1924 and 1927 Public Service Production Company had earned over $5,000,000.00 (R. 555, 1527, 1528).[62] United Engineers paid dividends to Public Service—$1,000,000 in 1928, $1,250,000 in 1929, and $1,000,000 in 1930, or a total of $3,250,000.00 (R. 555). This was $970,000.00 more than the investment in the stock of United Engineers, and it was equal to a return of 42.5% in the three years plus full return of investment. The ''losses'' to Public Service on United Constructors covering the period of the depression years represented only loans by Public Service to United Engineers, and amounted with unpaid interest thereon to only $1,018,892.50 for which it received $1,000,000.00 in debentures and the remainder in cash (R. 554-555, 1525-1526). It receives interest at 4% on the debentures and payments on account of principal (R. 405, 551-555, 968). The company is ''loaded up to the neck with work'' (R. 968). In place of the loss suggested by the Commission (R. 40), Public Service in what the Commission calls a ''misadventure'' has received a profit of $970,000 to which must be added the interest it has and will receive on the debentures.

Moreover, United Constructors did not drain off assets of Public Service via construction contracts—notwithstanding the suggestion of the Commission (R. 39)—for the

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[61] UGI, unlike Public Service, was a registered holding company and, pursuant to Section 13(a) of the Holding Company Act, found it necessary, or at least advisable, to sever its control over the construction company (R. 967, 1522-1523).

[62] Even so it had been unfortunate in its ventures into the paving business (R. 389-390, 392).

agreement preceding the formation of the former expressly provided that Public Service and UGI might have their own construction work done "by the operating departments of the companies themselves" (R. 1475) which was the practice of Public Service then and since (R. 543-548, 549-550, 551, 791).[63] The volume of work done by United Constructors for outsiders was "very much greater" than for Public Service or UGI (R. 966).

It was not a "misadventure" as characterized by the Commission (R. 48), though it was not the great success anticipated. Certainly the circumstances disclose no iota of UGI control or controlling influence over Public Service.

(*c*) *Public Service Financing.*

The difficulties of its financing problems in the early years and first World War have been set forth at pages 13-20, *supra*. As the Public Service officer in charge of finance testified, "During this war period, we borrowed as I have never known since" (R. 619).[64] The Commission finds that "UGI has been particularly active throughout the years" in Public Service financing, and as support for this statement sets forth the following: "On several occasions, UGI participated in the underwriting of applicant's securities" (R. 42). The facts are that on five occasions in the early or World War period, *in common with others in each*

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[63] That is not to say that United Engineers did not render special construction services for Public Service then or since (R. 406, 790, 966).

[64] "During the war * * * there was a very serious situation confronting every utility throughout the country. Money was very scarce and the company was trying to get money. It scraped up money and borrowed from every direction" (R. 651). "We were in very great straits all during the war period as to how to raise money. Utilities generally were suffering from higher costs of all kinds. We were trying to get increased rates and had difficulty in getting them, because of the rapidly rising prices, sufficient to meet the costs of operation and, at the same time, there were large expenditures required for war purposes * * * Our finance committee was constantly working on the situation" (R. 657-658, 700, 731-732).

"That was a period of high interest rates" (R. 620). "8% stock could not be sold in the open market. There was no market for it" (R. 667).

instance, UGI underwrote or purchased Public Service securities other than stock.[65]

Secondly, the Commission states that "UGI has made several loans" to Public Service, "one of which was for $2,750,000" (R. 42). In these three instances—in 1907, 1916, and 1917—UGI was one of two or more participants.[66] The Commission ignores that many others purchased securities and made loans, in which transactions UGI did not participate (R. 1283, 1312-1313, 1314-1315, 1317-1318, 1320, 1325, and see tables at pages 14-20, *supra*). Finally, the Commission states that Randall Morgan, "who was vice president and general counsel of UGI," made the arrangements for the largest of these three loans, "on several occasions represented Public Service in negotiations with bankers," and "handled the entire negotiations with General Electric Company for the funding with preferred stock of the indebtedness owed General Electric by Public Service" (R. 42). Since UGI had agreed to lend its aid, of course its officers had to participate in the arrangements. Moreover, Morgan was himself personally interested as an investor in Public Service (R. 1243), was a vice president, a director, and member of the finance committee of Public Service (R. 657-658, 664-666), and was properly called upon by McCarter to aid Public Service in these matters (R. 606).

The refunding of the equipment debt to General Electric in the negotiations for which Young of Public Service also participated (R. 666-667, 668, 1338-1347) indicates nothing

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[65] See the tables at pages 14-20 *supra*. Where it participated, UGI took no underwriter's compensation (R. 1038).

[66] R. 854-855, 1389. In 1907 Public Service borrowed $500,000, payable on demand, in which UGI participated to the extent of $166,666 (R. 1260). In 1916 Public Service borrowed $2,500,000 from Drexel and $2,750,000 from UGI upon a short term note, which was renewed from time to time and finally paid—together with a number of short term loans from others—in 1919 from the proceeds of the sale of short-term securities and preferred stock (R. 615-616, 1284-1297, 1311, 1313, 1336). In 1917 Public Service borrowed $1,600,000 on a four-month note, in which UGI participated to the extent of $400,000—which was repaid at the same time as the 1916 borrowing (R. 617, 1298, 1301-1302, 1310, 1311-1313, 1313, 1314, 1317).

so far as the relations of UGI to Public Service are concerned. Certainly no control or controlling influence by UGI is indicated in the actual participations in loans and financing, any more than as to the other participants. Furthermore, all of these incidents occurred more than twenty years ago. They did not extend beyond the war and "covered a period, the very trying period of war financing" (R. 621). Meanwhile, despite the depression of 1929 and another world war, Public Service has done and is doing its financing without such aid (R. 545-548). There are now no loans from UGI to Public Service or any of its subsidiaries (R. 1033). There never has been an open account between the two (R. 201, 1033), nor any loans to UGI or its subsidiaries (R. 530, 1033).

(d) *Acquisition of Utility Properties*

The Commission mistakenly finds that, "on occasion, UGI has acted for Public Service in the acquisition of utility properties" (R. 42). This refers to a single transaction in which Public Service acquired two gas properties in New Jersey which, together with another in Delaware, were owned by C. H. Geist of Philadelphia. In 1927 McCarter approached Geist in the attempt to purchase the two in New Jersey (R. 1530-1531), but nothing came of it (R. 359, 362, 1028). A year later, in the fall of 1928, UGI attempted to purchase the Delaware property (in which Public Service was not interested) from Geist (R. 360), but the latter declined to part with any of his properties "unless I sold out entirely" (R. 1538-1539). Thereafter Bodine, as chairman of the board of UGI, discussed the matter with McCarter and reported to him that a further reason for Geist's refusal to sell was "the exchange of stocks which would prevent his investing the proceeds in tax-free securities" (R. 1541). Another year passed and Geist in the fall of 1929 rejected an offer by McCarter on behalf of Public Service for the acquisition by the latter of Geist's gas properties in New Jersey; he suggested in lieu thereof an exchange for 140,000 shares of Public Service common stock and two seats on the Public Service board (R. 1531-1532); but this in turn was rejected by McCarter (R. 1533, 1534).

It became apparent that Geist not only desired to sell all of his gas properties or none, but that he also insisted upon a tax-free transaction (R. 364, 1543, 1544). After further negotiations, it appeared feasible for UGI to acquire the Delaware property (in which Public Service was not interested, since it strictly confined its gas and electric business to the State of New Jersey) and for Public Service to acquire the two New Jersey properties—by UGI acquiring them all and then separately exchanging the New Jersey properties for Public Service stock (R. 361-364, 988-989, 1028). The three-cornered arrangement was thereupon consummated in the spring of 1930 (R. 1546, 1549-1558, 1565-1568) subject to the approval of the Board of Public Utility Commissioners of New Jersey (R. 1548, 1561-1564, 1565). Thus UGI did not "act for" Public Service any more than the latter did for UGI; UGI made no profit from that part of the transaction in which Public Service participated (R. 361, 694, 989); and, as McCarter stated, there was no reason why he should have shouldered the burden of the final negotiations with Geist since McCarter had previously stated his terms (R. 363-365), Geist preferred to exchange his holdings for UGI stock (R. 364, 988), and the transaction was at least well along before McCarter was approached to participate (R. 366). Moreover, he thus managed to secure the common stock of both Atlantic City Gas Company and Peoples Gas Company for 116,934 Public Service shares (R. 1565) rather than the 140,000 that Geist had previously demanded when McCarter negotiated with him (R. 1532).

The Commission finds that "the audits and publicity for these transactions were handled by UGI" (R. 42). As to the publicity, the statement is based solely upon the fact that counsel for UGI submitted both to Public Service and to Geist its own proposed statement for the press (R. 1559), which in one sentence announced the acquisition by UGI from Geist and in another that "under an arrangement with P.S.C. of N.J." the two New Jersey properties would thereafter be transferred to it (R. 1560). It had been arranged with Geist that no publicity should be given until the examination of accounts and legal aspects had been completed

(R. 1547). The item in the record is not "publicity"; since the transaction was three-cornered, it was requisite that a statement mentioning all three parties should be submitted to all; and there is nothing to suggest that Public Service and Geist could not or did not issue statements of their own to the press. The matter necessarily became public, so far as the New Jersey properties were concerned, when the applications were filed with the New Jersey Public Utilities Commission for approval of the acquisition (R. 1562-1564). As to the audits, the documentary record is clear that Public Service made its own examinations and satisfied itself.[67] There is thus no substance in the Commission's findings.

(e) *Reorganization of Transport*

As stated at pages 21-22 *supra*, the reorganization of its transportation subsidiaries was one of the major phases of the corporate history of Public Service after its organization. The Commission's finding is that "UGI officials and directors were consulted and took a very active

[67] On April 24, 1930, McCarter wrote Zimmermann that "we know all about the physical aspects of the Geist New Jersey properties and in general about their earnings" and suggested that "the arrangement for the trade should provide that both parties should have the right to reasonably satisfy themselves as to the earnings for 1929—which will form the basis for exchange on a share-earning basis" (R. 1537). It is true that, under date of April 28, Zimmermann wrote McCarter saying, "I understand that you are willing to accept the audit * * * made by our people" (R. 1542), and that on May 2 the "vice president in charge of law" of Public Service sent a memo to McCarter stating Public Service "will be informed regarding the investigation to be made by U.G.I. accountants, and that our Law Department here will make the investigation into the legality of the New Jersey companies" (R. 1544-1545). But under date of May 9 the general counsel of UGI wrote stating representatives of both were working on the audit (R. 1546-1547). Thereafter the accountants of both completed the audit, and the general counsel of Public Service submitted his "reports on the legalities" (R. 1535). On May 27, 1930, Young of Public Service wrote McCarter that he understood from "our representative, Mr. R. C. James, who has been working with the UGI accountants" that the Geist representations were correct (R. 1535). On May 28 McCarter wrote UGI that "we have made such examination of the records and properties * * * as we desire" so that the transaction might be consummated (R. 1536).

part" in this matter (R. 43), but the fact is that they participated only as stockholders all of whom were necessarily concerned because, since the reorganization was in essence a merger of the underlying companies (R. 1726), a two-thirds vote of stockholders in all the corporations directly concerned was required by law (R. 424-425). It was discussed at length and in detail with *all* the stockholders (R. 429-432), of which of course UGI was one. "We could not have a reorganization without letting everybody know about it", and the stockholders were approached orally, by mail, and through the distribution of notices and reports (R. 429, 1743). "We could not put through a thing of this kind without everybody in interest, big and little, knowing the whole story"; and Zimmermann of UGI was consulted, but offered no plan of his own (R. 430-431). UGI's only direct concern was as a substantial stockholder (R. 1025, 1027), and Zimmermann's only other participation was as a director of Public Service (R. 1015-1025).

Drexel and Company, as a result of an agreement in connection with certain financing in 1921 (R. 1357), had been consulted with respect to plans for this reorganization (R. 717-720, 1724-1728). The plan adopted was the work of an exclusively Public Service committee appointed on April 18, 1934 (R. 1725-1729). In September 1939 Drexel called a meeting at Newark with both Public Service and UGI representatives present (R. 537-539, 714-716, 1026, 1727-1728), but, despite the Commission's statement to the contrary, there were no "conferences between McCarter and officials of UGI" thereafter (R. 43, 539-540, 1026). The evidence on this whole situation is largely documentary (R. 1724-1743) and properly relates to, and is related below, at pages 71-73 respecting the relations of Drexel and Company to Public Service.

(f) *Natural gas*

The Commission finds that Public Service and UGI "both vigorously opposed the introduction of natural gas into" territory served by either of them and that, "when Columbia Gas and Electric Corporation threatened" to do so in 1929 and 1930, "UGI took the lead in negotiations with

the Columbia company on behalf of itself and" Public Service and "Zimmerman kept McCarter advised of all negotiations and discussions" (R. 43). Except that it is true that Columbia Gas & Electric Corporation was attempting to find a market for its natural gas,[68] every other statement and implication in this finding is without substance and untrue. Zimmermann, for UGI, did not oppose the introduction of natural gas into territory served by UGI "if it could be bought at the right price" (R. 1001-1002) and, when he got the right price, he made a contract for it for UGI companies (R. 413, 1001-1002, 1006-1007). Though UGI regretted losing the benefit of the terms so secured, the state of Pennsylvania refused to grant Columbia the necessary charter on the ground that it would compete with the coal interests of that state (R. 414, 416, 1007). The efforts of Columbia were directed at UGI rather than Public Service—because Columbia did not have the pipeline facilities to serve Public Service (R. 413-414, 998); and Columbia only sought to sell to UGI and never did get "down to discussing the purchase of gas" by Public Service (R. 997-998, 1001).

Zimmermann kept McCarter advised of the UGI negotiations (R. 1002, 1029, 1697-1701, 1712-1721) because McCarter was then a director and executive committeeman of UGI (R. 419, 997, 1029). So far as Public Service was concerned McCarter and the vice president in charge of gas operations of Public Service—Mr. Clarke—after

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[68] R. 996. It should be noted that the Columbia company did not have a line to the eastern seaboard (R. 996), and the one it finally built into Pennsylvania "is standing there on the ground rotting its head off" because

> Pennsylvania is a state of cheap fuel. Coal is cheap, very cheap, you get fairly cheap water transportation * * * There is no justification in building a natural gas pipe line only for the purpose of selling gas to cooking ranges * * * You have got to sell a big amount of it for water heating, house heating, and * * * to industry * * * They were up against this competition of these fuels. (R. 998, and see 418.)

Pennsylvania, in fact, ultimately refused Columbia a charter, in order to protect its coal (R. 1007). In any case, the line was not large enough to have supplied gas in territory served by Public Service (R. 414, 998).

a careful study by Public Service (R. 411, 811-813, 814-815, 1005-1006, 1692, 1705-1706) vigorously opposed the introduction of natural gas into New Jersey as not commercially or economically feasible (R. 412-413, 455-456) and Public Service conducted its own discussions with Columbia (R. 415-416).[69] "We did not want to go along and we didn't" (R. 415).

This incident indicates nothing more than that (1) there were interlocking directorships between the companies involved but that (2) Public Service took a different and independent stand. If the Commission's finding that "United, which is the parent of UGI * * * is also the parent of Columbia Gas and Electric Corporation" (R. 43) has any significance, it is that United and UGI—both of which were interested in the natural gas proposition—had absolutely no influence upon Public Service with reference thereto, much less control or any controlling influence.

(g) *"Joint" Purchasing*

The Commission finds that "from 1903 * * * until 1925, applicant and UGI used a joint purchasing agent" (R. 43), but the facts are only that, after the original service contract with UGI expired in 1908 (see pp. 28-29, *supra*), a Mr. Pearson was retained as agent in connection with the purchase of supplies for Public Service and both corporations contributed to his salary (R. 386-387, 454-455, 469-472, 858, 859-861) of which Public Service paid $7,500 annually (R. 1191).[70] He reported to higher officials of Public Service and they approved or disapproved his actions (R. 470, 472). Thereafter, in 1925, Public Service officials took over completely (R. 387, 471, 857-859, 861, 870-874), except

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[69] Gossler of the Columbia company furnished Zimmermann with a copy of a letter the former had written McCarter, stating "I have not told Tom that I am sending you this letter" (R. 1708). Zimmermann then sent McCarter copies of the correspondence (R. 1709-1711).

[70] The uniform practice was to advertise for and accept the lowest bid on supplies of equal quality (R. 470-471). Although UGI manufactured certain gas equipment, its bids were rejected when not the lowest (R. 807, 1183).

that Pearson continued as a consultant for about two years at $5000 (R. 860-861, 874, 1191-1192, 1195).

That relation, such as it was, ended 15 years ago, but the Commission finds that "joint purchasing continued until 1939" (R. 43). This apparently refers to certain printed—or mimeographed—form group discount "contracts" issued by manufacturers to induce the purchase of larger volumes of certain electrical equipment, such as lamps and meters, in which Public Service participated with UGI in order to secure the definite savings involved (R. 879-881, 883-894, 901-902, 911, 1199-1202, 1256). They were offered by vendors—chiefly General Electric and Westinghouse—without request or negotiation on the part of Public Service (R. 888, 906, 908-909); had been customary and "just continued along" without any defined arrangement or understanding between Public Service and UGI, either company signing them for the benefit of the other (R. 895); and obligated neither company (R. 910-911). They had never been presented to, or known by, the higher officers of Public Service (R. 928-929). The execution of the contracts by one for the other ceased in 1933, though thereafter and until 1939 each company would sign for itself and have the benefit of group volume discounts (R. 862, 896-897, 899, 900, 905, 910, 911). All such purchases were finally discontinued because of doubt as to their continued validity under federal trade laws (R. 881-882, 901, 928-929) as the Commission itself finds (R. 43). Over the whole period, this so-called "joint purchasing" involved less than 4% of the total Public Service purchases, and netted it a saving of a little less than 2% on the purchases so made (R. 912-913). At all times thereafter Public Service secured discounts only as an individual purchaser (R. 898).

Public Service is and has been completely independent of UGI in its purchasing. For many years the only communications between the purchasing departments of Public Service and UGI have been very occasional and casual inquiries no different than those between Public Service and other utility companies (R. 874, 875, 907-908). Yet the Commission finds, with no other evidence whatever, that "the purchasing departments of Public Service and UGI

were at all times in communication with each other" (R. 43). Not only were there no such wholesale contacts but what contacts there were are significant of no control or controlling influence whatever.

(h) *"Reports" to UGI*

The Commission insists that Public Service reports to UGI "in considerable detail and [covering] a broad field" in a fashion "not furnished to anyone else in the same form or detail" (R. 43-44). The undisputed evidence, however, is that Public Service prepares monthly "a very detailed statement of earnings, presented in summarized form for the use of directors" and given in summary form to the newspapers (R. 283, 284, 560, 561); any stockholder could and some did secure the same information either occasionally or regularly (R. 283-284, 542, 565, 571, 577-578, 580, 582, 685-686); insurance companies who are stockholders receive even more elaborate reports annually than UGI does monthly (R. 685-686); and no great detail in any event was involved in the information sent to UGI (R. 1400-1401). The further finding that "Zimmermann and his staff scrutinize these reports and advise applicant of their suggestions and criticisms" (R. 44) is likewise untrue, for the record indicates nothing more than occasional requests for information.[71] The chief financial officer of Public Service recalled

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[71] UGI had been receiving the usual and regular monthly reports compiled by Public Service (R. 541-542) but, in 1929, requested—"if it is not too troublesome a matter," "if not inconvenient," and "if * * * agreeable to you"—the information in "a little different form than the way they had been receiving it" (R. 541, 560, 1400-1401). These periodical reports were transmitted to UGI with covering notes of transmittal (R. 1401, 561, 562, 1415, 1424, 1426-1428). Zimmermann, while a director of Public Service, in 1931 asked for an explanation of reduced earnings and suggested that in the annual audit "it might be well * * * to ask [the auditors] to incorporate * * * any comments on book-keeping transactions or practices with which they are not in accord" (R. 1402-1404); in 1934 asked for an "analysis of the changes in some of your balance sheet items" (R. 1404-1408); and in 1935 asked as to an unusual rise in "other net income" bringing it from red to black, learned that it was due to the sale of certain federal securities, and reminded vice president Young of Public Service that the Public Service board had de-

"only an occasional letter, I don't believe I have had a half dozen in 40 years" and "I don't get nearly as many requests from them as I do outside stockholders" (R. 565, 573). As a matter of fact, the record shows that, except when its officers were also Public Service directors and as such participated in their preparation, UGI received no advance proofs of the annual reports (R. 574-576, 684-685); and audits are submitted only to directors, but stockholders may always see them on request (R. 684).

(i) *Merger of UGI and United*

The Commission, without specification of details or circumstances, quotes part of a statement made by McCarter in 1931 respecting the then mooted merger of the United and UGI systems and the policy to be adopted by United (R. 44). But this was a United project and is therefore deferred for discussion at pages 70-71 *infra* in connection with the relation of Public Service and United.

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termined that such non-recurring income should be treated as a credit to surplus "rather than as an item in current operations" (R. 1409-1411). In 1936 Long, a vice president of UGI, asked that the monthly reports reflect acquisitions of preferred stock as in the annual reports to stockholders—which request bears the notation, "Mr. Young said he did not think this called for acknowledgment" (R. 1412); and in the same year, 1936, pursuant to a telephone request from a UGI "financial assistant," the statistician of Public Service sent him "a statement of the principal items included in 'Other Net Income'" (R. 1414). After he had ceased to be a director of Public Service, Zimmermann asked Young in 1938 the reasons for the increased expenses of the electric department which had been a principal cause for the decline of earnings (R. 1418-1423) and in 1939 asked the reason for an unexplained "large adjustment to surplus in the sum of $2,174,332.20" and noted that "the consolidated comparative income account contains no figures for the twelve months ending December" 1938 (R. 1425). In 1938 McCarter also notified Zimmermann of the previous filing of a registration statement with the Commission (R. 1416), and Zimmermann then requested a copy (R. 1417). These are the only requests or suggestions made since 1929. There were only two after Zimmermann ceased to be a director of Public Service, since the request for a copy of a registration statement after it had been filed and accorded publicity thereby can hardly be considered as a "request for information."

(j) *Projected Purchase of Jersey Central Power and Light Company*

In 1935 the Public Service board voted, over the opposition of Zimmermann as a director, to authorize McCarter to attempt to acquire the Jersey Central Power and Light Company (R. 1206) at a price which Zimmermann had long and vigorously opposed (R. 286, 629, 634-637, 825-826, 938, 985-986). The Commission's only comment is that "Zimmermann * * * had no objections to this acquisition" except as to the price and that "it does not appear that the matter was thought to be of sufficient importance to justify the exertion of any pressure by UGI" (R. 46 n. 6). As a matter of fact, however, Zimmermann "just did not like any part of it" (R. 729); and the gratuitous suggestion of the Commission that the matter was not "thought to be of sufficient importance to justify the exertion of any pressure" involves assumptions both as to the fact of its "importance" and the possibility of "pressure". If such speculations are valid, administrative hearings and records are empty forms.

(k) *Extra Dividend in 1936*

In 1936 the board of Public Service voted to declare an extra dividend over the objection of Zimmermann who was then a member of the Public Service Board (R. 279, 1206-1207). The Commission's only comment is that "it is not strange that this matter was not pressed by UGI" because "UGI was the principal holder of applicant's common stock and was the major beneficiary of this dividend" (R. 46 n. 6). But the precise point of difference was that UGI, assuming that it was "the major beneficiary", felt that the extra dividend would be harmful and "very strongly" opposed it (R. 629, 939) as contrary to its "settled policy" (R. 634). The Commission's cavalier assumption of the contrary is the sheerest sort of departure from the record.

(l) *Contest of Holding Company Act*

Over the strong representations of UGI and others, Public Service refused to join in the contest of the validity of

the Public Utility Holding Company Act (R. 286, 709, 743, 825, 1008-1009, 1205). The Commission seeks to explain this on the ground that it "did not represent any vital conflict, since it was apparent that the constitutionality of the Act would, in any event, be presented to the courts" (R. 46 n. 6). But the very point at issue was the determined and "quite emphatic" attempt to persuade the management of Public Service to join in the litigation rather than to file its application for exemption under the act (R. 629-630, 825).[72] The Commission's explanation is merely an attempt to minimize the independence of Public Service from the Commission's assumption of UGI control.

VII. THE "HISTORICAL RELATIONSHIP" BETWEEN PUBLIC SERVICE AND UNITED

For the recent organization and history of United, as well as its single director on the Public Service Board from 1930 to 1935, see Point II(B) of the Petition. Since the first four of the following five incidents have been fully treated with reference to UGI *supra*, the following omits the general background and only treats of the specifically alleged participation of United.

(a) *Pennsylvania Railroad electrification*

The Commission states "the active participation by United * * * in applicant's attempts to secure a contract to supply power to the Pennsylvania railroad furnishes an interesting and significant illustration of the relationship between the companies" (R. 35). The Commission also states that "with the help of * * * United, McCarter even attempted to buy up Clarke's property" (R. 36), that Howard "conducted negotiations in an attempt to buy out Eastern New Jersey Power [Clarke's] Company" (R. 38), that he "was not only kept informed and consulted by

[72] In this incident "sometimes unparliamentary language was used" (R. 630). John W. Davis was brought into the controversy and gave it "as his opinion we ought not to apply for exemption but that we ought to make an effort to test the Act by applying for a restraint and he was ready to stake his reputation on the unconstitutionality of the Act" (R. 825).

McCarter but that his approval was actively sought throughout all of the negotiations * * * and he was in communication with Zimmermann and McCarter in California relative to these negotiations" (R. 38), that thus "United * * * advised McCarter and shaped the course of his conduct of negotiations with the Railroad" and "important decisions by Public Service were made jointly with * * * United directors and officers" (R. 38), and that "the pressure exerted on the Railroad by * * * United in applicant's behalf was such that the Railroad agreed to pay $100,000 a year more for power than would have been necessary" (R. 38-39). Not a single one of these statements is true.

As set forth above in connection with UGI, McCarter attempted to put all the pressure he could upon the Railroad and, to this end, enlisted the aid of his friends and of every Public Service director, including Howard. But Howard didn't "conduct" or "approve" the negotiations, nor did he "shape" or make "joint" decisions with Public Service, nor did he by "pressure" help secure $100,000 from the Railroad. He did not enter the picture until 1930, three years after the matter had been opened, and then only to attend a conference between McCarter and Clarke (R. 1632). As a director of Public Service, he was thereafter kept informed of some of McCarter's activities in the matter (R. 1634-1636, 1642, 1647, 1650, 1658, 1661) and apparently made some inquiries on behalf of the attempt of McCarter to purchase Clarke's competing company (R. 1639-1640, 1653-1654) but was so far out of touch with the negotiations that on the very day that McCarter settled the matter with the Railroad so far as Public Service was concerned (R. 1662-1666) Howard actually telephoned an operating vice president of Public Service to say that his negotiations with Clarke would be interrupted because of the latter's departure for Europe (R. 1667). As to the $100,000 which the Commission finds was paid by the Railroad in excess of what "would have been necessary had it purchased the power from applicant's competitor" (R. 39), as set forth at pages 47-48, *supra,* the Railroad secured a valuable service from Public Service at cost because it

wanted the reserve power of Public Service at its disposal. Thus Howard had absolutely no contact with the Railroad representatives, apparently saw Clarke only once and then only in McCarter's presence six months before the matter was finally settled with the railroad, and put no "pressure" on anyone—much less did he control McCarter or Public Service.

(b) *United Engineers & Constructors, Inc.*

In what the Commission calls a "highly interesting" incident (R. 35), Howard of United was not "particularly active" as the Commission finds (R. 40) but, as a director of Public Service, four years after this joint engineering venture was conceived and a year after he had become a director of Public Service participated only in 1931 as a member of a committee formed to take action on major problems resulting from the situation of Robinson and Company in which not he, but Young of Public Service and Place of UGI carried the burden (R. 971, 974-977, 1503-1507, 1521).

(c) *Reorganization of Transport*

The reorganization of the transportation subsidiaries of Public Service, as set forth at pages 21-22 *supra* was one of the major operations in the simplification of the Public Service system. Since this matter was pending when Howard was a director of Public Service, he must have participated as such, but his directorship began after the proposals were first put forward and terminated five years before they were concluded. Nowhere does the record indicate that he, or anyone else on behalf of United, "took a very active part" or any part in connection with the proposals (R. 43). The matter is essentially one involving Drexel and Company as the principal participant with Public Service as fully set forth at pages — - —*infra* in connection with the relations of Public Service to the Morgan-Drexel banking houses.

(d) *Natural gas*

As to this matter, which is fully set forth at pages 60-62 *supra*, all that the Commission finds is that "United * * *

was fully advised of these negotiations and discussions" (R. 43). All that occurred was that McCarter sent Howard, Thorne of Bonbright and Company, and Hopkinson of Drexel and Company—all of whom were directors of both Public Service and United—copies of certain studies on the feasibility of the introduction of natural gas along the eastern seaboard so far as territory served by Public Service was concerned (R. 1702-1704, 1722-1723). Howard took no active part (R. 416-417), though Zimmermann recalled him as "fairly active" and taking "quite an interest in the discussions" as a director of UGI (R. 997). Nothing significant of control is indicated, and the obvious fact is that McCarter was merely pressing his conviction upon all who would listen that natural gas could not be utilized as a commercial proposition in the New Jersey area.

(e) *Merger of UGI and United*

As a parting shot, the Commission quotes from a portion of a long letter written on June 4, 1931, by McCarter to Howard of United regarding certain possibilities of readjusting utility ownership along the Atlantic seaboard (R. 44, 1798-1800). The facts unreported by the Commission are that United was formed by the Bonbright and Morgan investment banking houses with an idea of acquiring "actual voting control * * * of utilities along the Atlantic Seaboard * * * from Connecticut * * * to Maryland" (R. 304-305). McCarter expressed his dissent to Thorne and Loomis of Bonbright (R. 436) and was invited to discuss the matter with Whitney of the Morgan company to whom he expressed firm disapproval, saying he "would not stand for it" (R. 305). He and Wakelee of Public Service were again invited to confer, this time at lunch at the Morgan office with several of the Morgan partners; they again expressed dissent, and believed they had dissuaded the Morgan people (R. 306, 405-408). Apparently the idea had not died, however, and in 1931 McCarter—then a director of United—wrote the letter to Howard stating that his attitude had been and still was "one of hesitancy" as to the proper policy of United but, "if anything is to be done," suggesting a regrouping of utilities upon an intrastate basis

"of the Public Service type" (R. 1789-1800). That letter was nowise contrary to his expressed intention to prevent anyone from obtaining actual control of Public Service (R. 306-310) or to his fixed and previously expressed aversion to any "supermanagement" (R. 436-437). The Commission (R. 44) merely quotes part of one paragraph and the whole of another out of context. Nothing came of the proposal. The incident shows nothing more than the independence of Public Service management.

VIII. THE RELATIONSHIP OF PUBLIC SERVICE TO THE "MORGAN-DREXEL" BANKING HOUSES

Although the Commission does not in terms include Drexel and Company in its general discussion of the "historical relationship between Public Service and UGI-United" (R. 45), at several points it brings in both the Drexel and Morgan banking houses. Several banking institutions have served Public Service, including Fidelity bank, Winthrop & Company, Clarke Dodge and Company, Union National Bank of Newark, Red Bank Trust Company of Red Bank, Newton Trust Company of Newton, National City Bank of New York, and Bonbright and Company (R. 374, 508, 1259-1261, 1283-1285, 1301). Drexel and Company of Philadelphia, a branch of the Morgan banking house, came to do the greater part of the handling of Public Service security issues (R. 373-376, 374, 1072-1073) since they were the only institutions then available and in the business of handling such large issues of equity securities (R. 508-512). Morgan-Drexel also served UGI (R. 374, 955-956), and were the co-organizers and bankers for United as set forth in Point II(B) of the Petition.

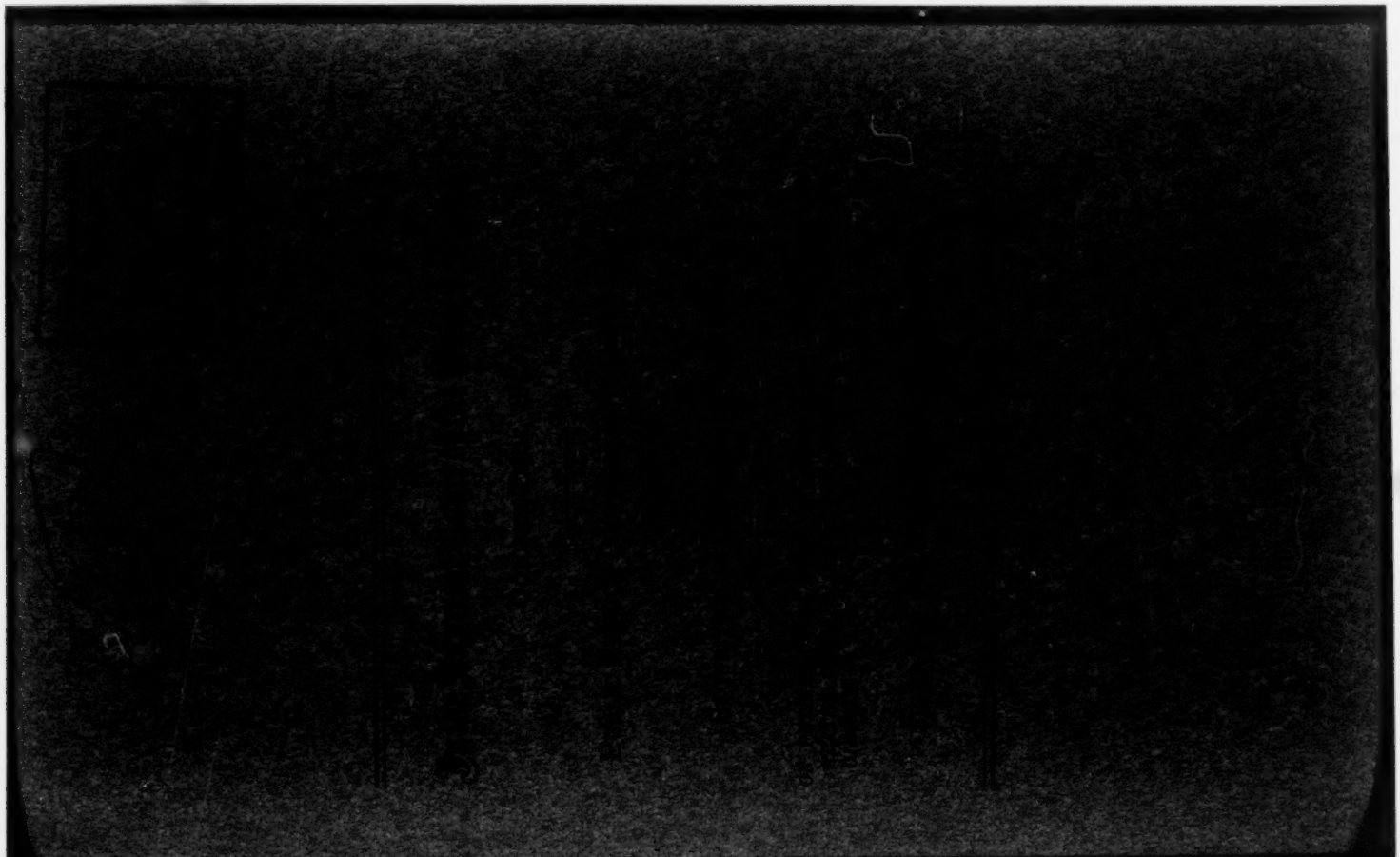
The tables at pages 14-20, *supra*, set forth the participation of Drexel in the financing of Public Service, along with that of many others. The Commission makes no finding of control or controlling influence on the part of "Morgan-Drexel," and indeed elsewhere it finds that it was UGI that was "particularly active throughout the years in applicant's financing" (R. 42). The Commission states, however, that for certain periods Drexel had "at least one

representative on the Public Service board" (R. 33). It is true that Lloyd of Drexel served from 1910 to 1919, Gates from 1926 to 1930, and Hopkinson from 1930 to 1938 (R. 1168, 1164-1165). The latter two served successively on the executive committee of Public Service during their tenure as directors, which ended in 1938 (R. 1169).

Drexel is drawn into the picture on only two occasions other than financing. In his drive to secure some of the business of supplying electricity to the Pennsylvania Railroad, McCarter called upon Gates of Drexel, a director of Public Service (see page 48 *supra*). In 1938 Gates, then president of the University of Pennsylvania and a director of the Railroad, was brought in by President Clement of the Railroad in an attempt to pacify McCarter eight years after the railroad electrification matter had been settled (R. 1689-1690).

The only other activity on the part of Drexel, other than in financing, was as advisers in the reorganization of the transportation subsidiaries of Public Service (R. 429-430). Drexel and Company became involved in the matter in 1921, when they made it a condition of the financing then done that the railway properties be reorganized as soon as practical in consultation with them (R. 1356-1359). In discussing this matter in its findings, the Commission does not mention either the Drexel or Morgan banking houses, but only participation of UGI or United as directors or shareholders (R. 43, and see pp. 59-60, 69, *supra*). The reorganization of its transportation subsidiaries was one of the major events in the corporate history of the Public Service system as set forth at pages — —, *supra*. The formulation of plans began in 1925 and the matter was not consummated until 1940 (R. 1724-1728). A committee of three Public Service men and one each from Bonbright, Drexel, and UGI—all directors of Public Service—was appointed in 1924 but produced nothing (R. 1724). In 1934 a committee of the Public Service management produced the basic plan which ultimately was adopted (R. 1725). Newbold of Drexel made many suggestions and, though many of his suggestions did not prevail, an agreeable plan was worked out by Public Service officers and Drexel and

consummated in 1940 (R. 430, 714-718, 1027-1028, 1726-1728). In these final phases, both Hopkinson of Drexel and Zimmermann of UGI—both no longer directors of Public Service but the former representing the banking house involved and the latter representing the stock interest of UGI—participated (R. 1026-1028, 1735-1742). Zimmermann had also actively participated when he was a director of Public Service (R. 1015-1025). For this service Drexel received a fee of $5000 (R. 916). No securities of any kind were sold, and the final plan required no financing (see Applicant's Exhibits 66A and 66B, not printed).



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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 521

PUBLIC SERVICE CORPORATION OF NEW JERSEY,
PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and opinion of the Commission (R. 23),[1] not yet officially reported, are set forth in the Commission's Holding Company Act Release No. 2998. The opinion of the Circuit Court of Appeals (R. 2057), affirming the decision of the Commission, is reported in 129 F. (2d) 899.

[1] The portions of the original voluminous record which counsel agreed to print are set forth in the Appendix to Petitioner's Brief in the court below. In accordance with the stipulation of counsel, the printed record in this Court comprises that Appendix, as supplemented by the proceedings below, to which all record references herein relate.

JURISDICTION

The decree of the Circuit Court of Appeals was entered August 12, 1942 (R. 2066). The petition for a writ of certiorari was filed November 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935.

QUESTION PRESENTED

More than ten percent of petitioner's outstanding voting securities are owned by each of two public-utility holding companies registered as such under the Public Utility Holding Company Act, namely, the United Corporation and its subsidiary, The United Gas Improvement Company. Petitioner applied to the Commission under Section 2 (a) (8) of the Act for an order declaring that it is not a "subsidiary company" of The United Corporation or of The United Gas Improvement Company. The basic question presented is whether petitioner has shown that it is not controlled, and that its management or policies are not "subject to a controlling influence," by these holding companies within the meaning of those provisions.

STATUTE INVOLVED

The applicable provisions of the Public Utility Holding Company Act of 1935 are set forth in an Appendix, *infra,* p. 18.

STATEMENT

The petitioner, Public Service Corporation of New Jersey, is a holding company, controlling a number of public-utility and transportation subsidiaries. The United Corporation ("United") directly owns 13.9 percent of petitioner's outstanding voting securities. The United Gas Improvement Company ("U. G. I."), 26.1 percent of whose securities are owned by United, in turn owns 28.4 percent of petitioner's outstanding voting securities.

Petitioner is thus a "subsidiary company" of both United and U. G. I. under Section 2 (a) (8) (A) of the Holding Company Act, since more than 10 percent of its voting securities are owned by each of them. It brought this proceeding under the last paragraph of Section 2 (a) (8), applying to the Commission for an order declaring that it is not a subsidiary company of either holding company. The Commission denied the application on the ground that petitioner had not shown that it is not controlled by United or U. G. I., or that its management or policies "are not subject to a controlling influence" by them within the meaning of those provisions. The findings and opinion of the Commission (R. 23–49), as approved by the Circuit Court of Appeals (R. 2057–2066) may be summarized as follows:

Since 1929, when United was organized, United and its subsidiary, U. G. I., have owned a ma-

jority of petitioner's outstanding common stock. Since 1932 U. G. I. has owned 36.66 percent and United 17.96 percent, a total of 54.62 percent. The combined holdings of U. G. I. (including 10,000 shares of voting preferred stock) and United constitute 42.3 percent of petitioner's outstanding voting securities. The balance of petitioner's securities are widely scattered. The holdings of the thirty next largest stockholders range from 1.7 percent to .11 percent, and their combined holdings aggregate 8.85 percent of petitioner's voting securities. At every annual meeting of petitioner's stockholders from 1929 through 1940 United and U. G. I. have cast a majority of the total stock voted. In 1941, when United voluntarily refrained from voting its stock, U. G. I.'s stock alone represented 49.2 percent of the total stock voted. From 1929 to 1940 U. G. I.'s stock alone represented from 35.8 percent to 41.3 percent of the total stock voted. In 1936, although petitioner conducted an extraordinary proxy drive in connection with proposed charter amendments requiring a two-thirds vote, United and U. G. I. cast 53.5 percent of the total stock voted, U. G. I. alone casting 36 percent. (R. 28–30.)

United's and U. G. I.'s ownership of petitioner's voting securities has enabled them at any time to pass or defeat resolutions, and to break quorum, and affords them an absolute veto power as to all matters of corporate action requiring a class vote or two-thirds vote (R. 30–31).

Directors and officers of U. G. I. held positions on petitioner's board of directors, executive committee, and other management committees from the organization of petitioner in 1903 until 1938 when this Court in *Electric Bond & Share Company* v. *Securities and Exchange Commission,* 303 U. S. 419, sustained the constitutionality of the registration provisions of the Public Utility Holding Company Act. United had similar representation from 1930 to the time of the *Bond & Share* decision. Of the twenty-seven members of the petitioner's executive committee since 1903, twelve have been directors and members of the executive committee of U. G. I. or directors of United. From 1930 to 1934, six of petitioner's nine executive committee members were members of U. G. I.'s board and executive committee or United's board. U. G. I. has also had substantial representation on the boards of petitioner's important utility subsidiaries. Since 1924, when petitioner's most important operating utility subsidiary, Public Service Electric and Gas Company, was formed, twelve of the twenty-five members of its board of directors have been directors and members of the executive committee of U. G. I. or directors of United. (R. 33–35.)

The Commission concluded that the present absence of interlocking directorships is not entitled to any great weight, and that the resignations of the interlocking directors were entirely unrelated

to renunciation of control and controlling influence. Admittedly U. G. I. can resume its interlocking directorships at any time (R. 990–991). Subsequent to the resignations, petitioner has consulted with officials of both holding companies with regard to its important problems (R. 45).

Petitioner could not have been formed without the affirmative approval of U. G. I., and its then President was one of petitioner's three original incorporators. Of petitioner's 24 original directors, five were U. G. I. officials or employees. Immediately upon organization, petitioner entered into a five-year contract whereby U. G. I. supplied it with engineering, purchasing, and a general advisory service. (R. 31–33.)

From 1927 to 1930, directors and executives of U. G. I. and United participated actively in an attempt to secure a contract for petitioner with the Pennsylvania Railroad to supply power to its newly electrified lines, even though a practically wholly owned subsidiary of U. G. I., Philadelphia Electric Company, was a logical competitor for the business. Philadelphia Electric Company entered the competition only when it became apparent that petitioner could not get the contract and that an independent utility might. When Philadelphia Electric Company got the contract, provision was made for petitioner to supply emergency power. In this connection, one of petitioner's officials had stated to a Philadelphia Electric official that the question of

emergency service could be settled equitably "since we are one and the same interest" (R. 37). Throughout the entire negotiations, U. G. I. and United officials advised petitioner's management as to the procedure and strategy to be employed (R. 35–39).

In 1928, at the suggestion of U. G. I., petitioner and U. G. I. consolidated their respective subsidiary construction and service companies by organizing United Engineers and Constructors, Inc., a joint servicing and construction company. Initially, petitioner was given a minority interest in the new company, although its subsidiary construction company had been by far the most profitable of the companies consolidated. Petitioner's President complained, stating: "All this comes about, I suppose, from *the intimacy of our relations* and the haste with which the matter was attempted to be consummated. What all of us want is a fair settlement of this whole matter that will stand any investigation by anybody, and certainly we do not want any disagreement about it" (R. 40). Although petitioner later became a 50-percent owner, with U. G. I., of the stock of United Engineers and Constructors, Inc., the company was managed almost exclusively by U. G. I. When the joint enterprise proved undesirable, U. G. I. handled the problems arising until 1938, when petitioner and U. G. I. simultaneously disposed of their stock ownership. (R. 39–42.)

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Throughout the years, U. G. I. participated in petitioner's financing and, on occasion, has loaned it substantial sums of money. On occasion, U. G. I. acted for petitioner in the acquisition of utility properties. From 1925 to 1939, officials of both United and U. G. I. aided petitioner in the reorganization of its transportation subsidiaries. In 1930, U. G. I. took the lead in negotiations with Columbia Gas & Electric Corporation, another subsidiary of United, to persuade Columbia to refrain from an attempt to introduce natural gas into the territory served by petitioner. (R. 42–43.)

From 1903 until 1925, petitioner and U. G. I. employed a joint purchasing agent and continued to engage in joint purchasing until 1939. In many of U. G. I.'s purchasing contracts, petitioner was held out as its "subsidiary" or as an "allied" company. Petitioner furnishes U. G. I. with regular monthly detailed reports covering its operations, a practice which is not employed with other stockholders, and U. G. I. advances suggestions and criticisms from time to time. (R. 43–44.)

On the basis of the foregoing, the Commission determined that petitioner had not sustained the burden of proving that it is not a subsidiary of United and U. G. I.

ARGUMENT

The narrow issue involved is whether petitioner sustained the burden of showing before the Commission that it is not controlled, or subject to a controlling influence, by United and U. G. I. The decision of the court below that petitioner had not sustained that burden is correct and does not call for further review.

Since 28.4 percent of petitioner's voting securities are owned by U. G. I. and 13.9 percent by United, petitioner is a "subsidiary company" of both U. G. I. and United under Section 2 (a) (8) (A) of the Public Utility Holding Company Act. Under the provisions of Section 2 (a) (8), the Commission is required, upon application, to declare that a company is not a subsidiary if it finds that *all* of three conditions have been met. Two of these conditions are that:

> (i) the applicant is not controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever, * * * and
> (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to

> make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies.

Petitioner had the burden of proving, by a preponderance of the evidence, all conditions necessary to bring it within the exception provided by Section 2 (a) (8) of the Act.[2]

The Commission concluded that it could not make the requisite statutory findings on the basis of its evidentiary findings recited above (*supra*, pp. 3–8). The court below, in refusing to disturb the ruling of the Commission, stated (R. 2059):

> We have examined the record in the light of Public Service's argument that the Com-

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[2] In *Detroit Edison Co.* v. *Securities & Exchange Commission*, 119 F. (2d) 730, 739 (C. C. A. 6th), certiorori denied, 314 U. S. 618, the court held, with respect to the exception provided in Section 2 (a) (8):

"Provisos and exceptions in statutes must be strictly construed and limited to objects fairly within their terms, since they are intended to restrain or except that which would otherwise be within the scope of the general language. The burden rested on petitioner to bring itself within the exception. *Schlemmer* v. *Buffalo, Rochester & P. R. Company*, 205 U. S. 1, 27, 27 S. Ct. 407, 51 L. Ed. 681." See also *Securities and Exchange Commission* v. *Sunbeam Gold Mines*, 95 F. (2d) 699, 701 (C. C. A. 9th); *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U. S. 299; *Grand Trunk Ry. Co.* v. *United States*, 229 Fed. 116 (C. C. A. 7th).

> mission's fact findings are not supported by substantial evidence and we find no merit in Public Service's contentions in this regard. Indeed some of these contentions are so wholly lacking in merit as to border on the frivolous. It is sufficient to say that the evidence fully supports the findings of the Commission. * * *[3]

Petitioner's own analysis of the evidence, contained in the Appendix to its petition, shows clearly that there was substantial evidence supporting the Commission's conclusions. Petitioner is asking the Court to reweigh the evidence—to substitute its judgment for that of the Commission. This, of course, the Court will not do.

Although the issue in the case is essentially factual, petitioner obscures that issue by alleging a number of errors based upon misinterpretations of the Commission's findings and of the Act.

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[3] In *Detroit Edison Co.* v. *Securities & Exchange Commission*, *supra*, a similar proceeding, the holding company in question owned 19.28 percent of the applicant's voting securities. Another independent holding company owned in excess of 20 percent. The Circuit Court of Appeals for the Sixth Circuit refused to disturb the Commission's ruling that the applicant had failed to sustain its burden of proving the condition contained in clause (iii) of Section 2 (a) (8), and this Court declined further review. The 42.3 percent of voting strength in the instant case has afforded United and U. G. I. the power to cast a majority of the votes, and U. G. I. alone substantially more than one-third, at all of petitioner's stockholders' meetings. This presents an *a fortiori* case.

1. It argues that the Commission held that power to acquire control in the future, rather than present control, is sufficient to justify denial of the application. But the Commission did not so hold. It did hold that present power to exercise control is "control" whether or not it is actively exercised. The court below sustained this interpretation of the statute, saying (R. 2063):

> A "controlling influence" may exist, although in a latent form. *Detroit Edison Co.* v. *Securities & Exchange Commission, supra.* Even though, after 1938, UGI and United did not utilize their voting strength to elect directors, pass resolutions or veto corporate changes the latent power to do so was a present power to exert a "controlling influence" upon Public Service at any time.

The court below did not err in this construction. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 145; *Detroit Edison Co.* v. *Securities & Exchange Commission,* 119 F. (2d) 730 (C. C. A. 6th), certiorari denied, 314 U. S. 618.

2. Petitioner argues that the Commission could not treat United and U. G. I. as parent and subsidiary without proving a relationship of control between them. But the Commission was entirely warranted in treating United and U. G. I. as parent and subsidiary in determining whether a relationship of control or controlling influence, "di-

rectly or indirectly," existed between petitioner and U. G. I., or petitioner and United. Since United owns 26.1 percent of the voting securities of U. G. I. and neither company has applied for an order under Section 2 (a) (8) declaring U. G. I. not to be a subsidiary of United, the Commission is required to recognize their relationship as defined by the Act. Despite notice, neither United nor U. G. I. appeared at the Commission hearings to place in issue its relationship to the other. Petitioner made no attempt to prove that U. G. I. is not, in fact, subject to United's control or controlling influence.

In similar circumstances involving United and another of its subsidiaries, Columbia Gas & Electric Corporation, the Commission's comparable treatment of the statutory parent-subsidiary relationship as conclusive was upheld in *Morgan Stanley & Co.* v. *Securities Exchange Commission,* 126 F. (2d) 325, 328 (C. C. A. 2d). The court held, as to the relationship between Columbia Gas and United, which owns 19.6 percent of Columbia's voting stock:

> Although petitioner argues that the mere fact of Columbia's status as a "subsidiary company" within the definition of § 2 (a) (8), 15 U. S. C. A. § 79b (a) (8)—as owning 10% of the stock—is not controlling, we think there is little need to discuss this point.

> Columbia has never carried through any attempt to have the Commission find that it is within the exceptions of § 2 (a) (8); and in the absence of such action by Columbia, the Commission is warranted in relying on the statutory definition of a subsidiary company. Furthermore, the 20% holding of United is the largest block of voting securities; and there is supporting evidence in the record showing various connections between United and Columbia.[4] We are not unaware that much less than a majority of stock is frequently sufficient for purposes of control, and we see no reason to contest the legislative view that 10% may be sufficient.[5]

Accordingly, the Commission was fully warranted in considering the question before it as one involving the relationship of petitioner on the one hand and U. G. I. and United on the other. In any event, the stock ownership of *each* of the holding companies and the evidence as to the par-

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[4] The record contains such evidence in the instant case, e. g., interlocking directorates between United and U. G. I. and an extensive history of concerted action relative to petitioner, beginning with United's formation in 1929.

[5] In a concurring opinion, L. Hand, J., stated (p. 333): "* * * quite aside from any implications from the statutory definition of 'subsidiary', § 2 (a) (8), I think we can take judicial notice of the fact that the ownership of twenty per cent of the voting power of a company makes the owner 'liable' to have practical control."

ticipation of *each* in petitioner's affairs, supports the Commission's ruling as to its inability to find that petitioner is not controlled, directly or indirectly, or that its management or policies are not subject to a controlling influence, directly or indirectly, by *each* of the holding companies. Contrary to petitioner's contention (Pet. 26), the Commission so concluded (R. 49):

> * * * we cannot find, as requested by the applicant, that it is not controlled by, or subject to the controlling influence of, United *or* U. G. I. * * * (Italics supplied.)

3. There is no substance to petitioner's contention that certiorari should be granted on the ground that the underlying issue in this case is whether petitioner shall be subjected to the integration and corporate simplification provisions of Section 11 of the Public Utility Holding Company Act (Pet. 12). Of course, petitioner's status as a subsidiary would subject it to the provisions not only of Section 11 but of the other sections of the Act applicable to subsidiaries. The application of the regulatory provisions of the Act to petitioner, however, is irrelevant in a proceeding for a declaration of status under the Act. Petitioner may not here, any more than was done in *Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 443, invoke the application of the statute *in limine* in respect of all

its activities in a proceeding whereby it seeks to establish that it is not a subsidiary company.[6]

4. Finally, petitioner's contention that the Commission did not make its findings in proper form or sufficiently indicate its basic findings is without merit. Since petitioner's burden was to convince the Commission of the *absence* of control and controlling influence, it was unnecessary to make findings on all the requests presented. The Commission made the findings of fact summarized above (*supra*, pp. 3–8). These findings clearly indicated the basis for the Commission's conclusion that it was unable to find an absence of control and controlling influence by United or U. G. I. No more is required. *Swift & Co.* v. *National Labor Relations Board*, 106 F. (2d) 87, 94 (C. C. A. 10th).

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[6] The legislative history cited by petitioner appears to relate only to the interest evidenced by its representatives in the drafting of the exemption provisions of Section 3 (a) of the Act, on which it has relied as a basis for not registering as a *holding company*. These provisions are not now in issue. If the discussions cited could be construed as pertinent in any way to the question whether petitioner might be subject to the Act as a *subsidiary* of other holding companies, they indicate that at most Congress intended to provide a machinery by which absence of control or controlling influence could be established where the evidence warranted findings to that effect. Congress did not expressly exempt petitioner as a holding company or as a subsidiary of a holding company and merely provided an exemption of which petitioner *could take advantage if it could prove the factual prerequisites provided by Congress.*

CONCLUSION

The decision of the court below is correct. It turns substantially on the facts and presents no question worthy of further review. The petition should be denied.

Respectfully submitted.

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DECEMBER 1942.

APPENDIX

Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C., Sec. 79:

SEC. 2. (a) (8) "Subsidiary company" of a specified holding company means—

(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause or clause (B)), unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company; and

(B) any person the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies.

The Commission, upon application, shall by order declare that a company is not a subsidiary company of a specified holding company under clause (A) if the Commission finds that (i) the applicant is not

controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever, (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies. The filing of an application hereunder in good faith shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company of such specified holding company until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of, and as a part of, any order granting such application, the Commission may require the applicant to apply periodically for a renewal of such order and to file such periodic or special reports regarding the affiliations or intercorporate relationships

of the applicant as the Commission may find necessary or appropriate to enable it to determine whether in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke the order declaring such company not to be a subsidiary company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order. Any application under this paragraph may be made by the holding company or the company in respect of which the order is to be entered, but as used in this paragraph the term "applicant" means only the company in respect of which the order is to be entered.

* * * * *

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying

that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and

decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

PUBLIC SERVICE CORPORATION OF NEW JERSEY,
Petitioner,

v,

SECURITIES AND EXCHANGE COMMISSION.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

HOMER CUMMINGS,
WILLIAM STANLEY,
WENDELL J. WRIGHT,
Counsel for Petitioner.

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REPLY BRIEF FOR PETITIONER.

The Commission's brief in opposition seeks to make it appear that petitioner is asking this Court to "reweigh the evidence" in a case which is "essentially factual" (Br. in Opp., 11).[1] Neither suggestion is true. The facts of record are not disputed. The issues are purely questions of law.

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[1] It may be noted that the Commission here (Br. in Opp., pp. 3-8), as did the court below (R. 2059-2061), has merely summarized the findings of the Commission—albeit with some verbal changes and embellishments so as to picture Public Service in an even more servile and unfavorable light than the Commission or the court below itself attempted.

I

An essential and basic issue here is the Commission's interpretation of the words "control" and "controlling influence" as they were used by Congress in Section 2(a)(8) of the Act. The Commission's brief in opposition attempts to make it appear that the issue is whether "present power to exercise control" is within the statute "whether or not it is actively exercised" (Br. in Opp., p. 12). Petitioner not only raised no such issue, but expressly disclaimed any such issue:

> Petitioner does not suggest that any company with present control of, or controlling influence over, another—whether exercised or not—does not render the latter a subsidiary within the meaning of the statute. (Petition, p. 30.)

The issue here is whether the statutory words "control" and "controlling" are to be taken—as petitioner contends—in their ordinary and intended meaning, or—as the Commission would have it—as "something less in the form of influence over the management or policies of a company, than 'control' of a company" (*H. M. Byllesby & Company, et al.*, 6 S. E. C. 639, 651). "We need not find that [a holding company] has the power to carry its point on every occasion" (*Koppers United Company*, S. E. C. Release No. 3812, September 29, 1942, p. 8). Here also the court below, quoting with approval from the decision of another circuit court of appeals, held that control

> does not necessarily mean that those exercising controlling influence must be able to carry their point. A controlling influence may be effective without accomplishing its purpose fully. (R. 2063.)

In this case, moreover, because of the vague nature of its findings, we do not know how much less than "control"

or "controlling influence" the Commission regards as sufficient to subject parties to the pains and penalties of the statute.

It is plain, however, that the Commission and the court below interpret "control" as "something less * * * than 'control'." In so doing they depart from the statute, disregard the express intention of Congress, and in fact depart from the Commission's position previously announced to this Court. On the single occasion when the statute was before this Court for oral argument, the Commission took a very different view, italizing its words:

> A holding company, by express definition * * * is a company which *actually controls* operating companies * * * Conversely, a subsidiary company, by express definition * * * is a company *actually controlled* by the holding company, and not simply a company in which the holding company has a substantial interest. (*Electric Bond & Share Co.* v. *Securities and Exch. Comm.*, Br. for Resp., Appendix A, p. 6, decided by this Court in 303 U. S. 419.)

It was there announcing its interpretation in the very words of the legislative history of the provision as stated on the floor of the Senate by the committee chairman in charge of the measure:

> Even if they hold 40 per cent of the stock of a company they may come before the Commission and produce evidence that they are not actually in control of the company, and the Commission is directed to make a finding and to exempt them if they are not actually controlling the company as the word "control" is defined in the bill. (79 Cong. Rec. 8397.)

See to the same effect 79 Cong. Rec. 8439. This position was announced upon a background of specific consideration of the provision in question. As shown by the report of the Senate committee on the bill which finally became

law, the provision was "completely rewritten in the interests of clarity and definiteness" to substitute "controlling influence" for the previous proposal specifying only "material influence" (Sen. Rep't No. 621, 74th Cong., 1st Sess., p. 5).

The Commission thus seeks to have this Court approve administrative and judicial nullification of the deliberate language of the national legislature. Since Section 2(a)(8), and its corollary Section 2(a)(7), embody pivotal provisions of the Act, an important and recurring issue of federal law is presented which should be settled by this Court.

II.

A second basic issue—and one solely of law—is the propriety of the Commission's grouping of "UGI and United" or "UGI-United" in order to make it appear that an overwhelming block of voting securities is held by a joint or single interest. The issue is crucial because upon it depends all of the Commission's reasoning and findings both as to the voting power of "UGI and United" over Public Service (R. 27-31, 45, 46-47, 48) as set forth in Point I of the petition (pp. 17-39) and the "historical relationship" between Public Service and "UGI-United" (R. 31-44, 45, 47-48) as set forth in Point II of the petition (pp. 39-49).

The Government now takes contradictory positions on this issue. It both defends and denies joining UGI and United, stating (a) that the statute requires the Commission to make the assumption, (b) that neither UGI or United contested the relationship assumed by the Commission, (c) that petitioner made no attempt to disprove the Commission's assumption, (d) that the evidence would support findings that each or either UGI or United controls or exercises controlling influence over Public Service, and (e) that the Commission did not consider them as jointly controlling Public Service but found that they singly

did so (Br. Opp., pp. 12-15). None of these is sound in law or founded in fact.

(a) The statute does not require or permit the Commission to lump UGI and United into a single entity for the purpose of determining control or controlling influence over Public Service. The statute provides no more than that, wherever there is a 10% or more voting security ownership by "a specified holding company," one or the other of the companies involved may file its application for a declaration of status, which the Commission must determine in the light of the facts presented of record. The statute itself provides that the filing of the

> application * * * in good faith shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company * * * until the Commission has acted upon such application. (Section 2(a)(8).)

To construe the statute as setting up a presumption, conclusive or even evidentiary, would require this court either to declare the statute invalid or to overrule its previous decisions. *Miller* v. *United States,* 294 U. S. 435, 440; *Heiner* v. *Donnan,* 285 U. S. 312, 329; *Manley* v. *Georgia,* 279 U. S. 1, 6; *Western & Atl. R. Co.* v. *Henderson,* 279 U. S. 639, 642-644; *Mobile etc. R. R.* v. *Turnipseed,* 219 U. S. 35, 43.[2]

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[2] The Commission quotes at length (Br. in Opp., pp. 13-14) from *Morgan Stanley & Co.* v. *Securities Exchange Commission,* 126 F. 2d 325, 328 (C. C. A. 2) as sustaining "the Commission's comparable treatment of the statutory parent-subsidiary relation as conclusive." But that case did not involve Section 2(a)(8) but Section 2(a)(11)(D) relating to affiliates and applying to corporations where "there is liable to be such an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate * * * that such person be subject to the obligations, duties, and liabilities imposed in this title upon affiliates." It involved, more particularly, the application of one of the Commission's rules relative to underwriters' fees. The dicta of the court there was, con-

Even if the statute were to be construed as erecting an ordinary presumption, the situation is still no different, for Public Service has come forward with at least a prima facie case as to its independence from any actual, direct, or indirect control or controlling influence on the part of UGI or United (Petition, pp. 7-9). Consequently,

> the presumption falls out of the case. It never had and cannot acquire the attribute of evidence * * * The issue must be resolved upon the whole body of proof pro and con. (*Del Vecchio* v. *Bowers,* 296 U. S. 280, 286-287.)

And see to the same effect *New York Life Ins. Co.* v. *Gamer,* 303 U. S. 161, 171; *Atlantic Coast Line* v. *Ford,* 287 U. S. 502, 507; *Mobile, etc. R. R.* v. *Turnipseed,* 219 U. S. 35, 43.

(b) It is immaterial that, as the Government states (Br. in Opp., p. 13), neither UGI or United have appeared in these proceedings to contest the Commission's assumption that United actually controls UGI. Neither UGI, United, or petitioner had notice of any such issue. The Commission's notice of hearing contained no specification of any such issue (R. 1815-1816). No one, therefore, before or during the proceedings had the notice to which they are entitled by the rules of fair procedure and due process of law. *General Utilities Co.* v. *Helvering,* 296 U. S. 200, 206; *Helvering* v. *Tex-Penn Co.,* 300 U. S. 481, 498; *Labor Board* v. *Mackay Co.,* 304 U. S. 333, 350; *Edison Co.* v. *Labor Board,* 305 U. S. 197, 234.

Moreover, upon receipt of the Commission's notice of hearing, United Corporation denied that it "directly or

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sequently, wholly gratuitous. In the present case, moreover, Public Service is admittedly an affiliate by virtue of Section 2(a)(11)(A) because of the ownership of "5 per centum or more of the outstanding voting securities" each by UGI and United; and Public Service not only has no desire to escape from the disabilities of affiliates but, in its petition (pp. 36-37, 38-39), stresses that status as protecting it from any possible control or influence on the part of UGI or United.

indirectly'' exercised a controlling influence over the management and policies of Public Service, and declined to participate in the proceeding (R. 1120). UGI did the same (R. 1121-1122). They may never have occasion *inter se* to test their relationship, and certainly their forbearance cannot bind Public Service. Even had there been a decision in a proceeding involving those parties, it would not be *res adjudicata* as to Public Service if the latter had not been a party in the proceeding. *A fortiori,* there never having been such a proceeding, Public Service cannot be bound.

(c) The Commission contends that petitioner ''made no attempt to prove that UGI is not, in fact, subject to United's control or controlling influence'' (Br. in Opp., p. 13). But petitioner has done all that it could and all that it is required to do respecting the interrelation of UGI and United. In its application for declaration of status, petitioner pleaded that)R. 1106)

> neither the said United Gas Improvement Company nor said United Corporation, *either separately or jointly,* exercises any control or controlling influence over the policies and management of applicant. (Emphasis supplied.)

From the Commission's files, petitioner secured and introduced the disclaimers and declinations of UGI and United (R. 133, 1120-1122). Petitioner also secured and introduced various statements and declarations of both UGI (R. 1116-1117) and United (R. 1117-1119) filed with the Commission disclaiming either direct or indirect control over Public Service. By the rules of evidence in law and at equity, to say nothing of the more liberal rules applicable in administrative proceedings, those items are evidence; and there is nothing in the record to rebut them. They are declarations made by parties who knew the facts,

they were required to be filed with a public authority under pains and penalties of law for misstatement, and as statements of fact they have never been questioned by the Commission through submission of counter evidence. They were not merely admissible and actually admitted in evidence (R. 132-133) but they are entitled to weight as evidence and as the sole evidence of record.[3]

Moreover, there was nothing further which, as a practical matter, petitioner could do, for it has no visitatorial, inquisitorial, or other investigating powers which would enable it to go into files and records or take sworn testimony in private or otherwise discover the existence of documentary or testimonial evidence. The Commission, and the Commission alone, has those powers (Section 18). The Commission will issue subpoenas at the instance of private parties only where the latter specify "the documents desired and the facts to be proved by them, in sufficient detail to indicate the materiality and relevance of the documents desired" (Rules of Practice, V(g)). Without investigatory powers, petitioner is wholly unable to discover evidence upon which to request the issuance of administrative subpoenas.

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[3] At the administrative hearing the only objection of counsel for the Commission was not that these items of documentary evidence were not evidence, but that they were "entitled to very little weight" (R. 132). This Court has uniformly and invariably approved as both admissible and entitled to weight as evidence corporate books, statements, or declarations of various kinds. These include books of a public utility "kept in the ordinary course under general supervision" of a state administrative agency (*Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 176); published price lists and market reports with reference to questions of value (*Virginia* v. *West Virginia*, 238 U. S. 202, 212); books of account and letters (*American Surety Company* v. *Pauly* (No. 1), 170 U. S. 133, 159; *American Surety Company* v. *Pauly* (No. 2), 170 U. S. 160, 172), declarations of ownership published in a newspaper (*Dunlop* v. *United States*, 165 U. S. 486, 492), reports made "in the course of * * * official duty" (*Vicksburg, &c., Railroad Co.* v. *Putnam*, 118 U. S. 545, 553), and the official records of a corporation (*Owings* v. *Speed*, 5 Wheat. 420, 423-424).

(d) The Government here takes the position that "the stock ownership of *each* of the holding companies and the evidence as to the participation of *each* in petitioner's affairs" would support a ruling that either one or the other controlled or exercised a controlling influence over Public Service (Br. in Opp., pp. 14-15). In the first place, the Commission has not attempted to find the relationship between Public Service and either UGI or United separately. Courts cannot review the question because they would be usurping the administrative function in doing so. "Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence." *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489; *Atchison Ry.* v. *United States*, 295 U. S. 193, 201; *Florida* v. *United States*, 282 U. S. 194, 215; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86; *Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48, 59; *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511. Only the Commission is authorized to make findings; and it does not lie in the Government's power to remake the case, upon the record or otherwise, in the guise of supporting the Commission's order.

Moreover, the suggestion is absurd that Public Service is controlled by, or subject to the controlling influence of, United apart from UGI and without UGI's holdings in Public Service. With 13.9% of the voting securities, United manifestly could do nothing as against the strongly organized New Jersey interests or the institutional investors or the other stockholders generally; and, the few "historical" contacts between United and Public Service were of short duration, slight, and without significance as set forth in the petition (pp. 46-48) and Appendix (pp. 67-71). Conversely, UGI alone is in no position of control or controlling

influence, latent or otherwise, for the many reasons set forth in the petition (pp. 32-46).

(e) Finally, the Government concludes on this issue with the assertion that the Commission itself treated UGI and United separately and found control or controlling influence in each of them individually (Br. in Opp., p. 15). Its only support is that in one reference (R. 49) the Commission used the phrase "United *or* UGI" (emphasis supplied). The answer is that, for twenty pages (R. 29-49) and even on the very page where the one variation occurs (R. 49), the Commission speaks only in terms of "UGI and United" or "UGI-United".[4] If the single reference, in its ultimate conclusion, to "United or UGI" is to be taken as the Government here urges, then that conclusion is supported by none of the basic or subsidiary findings and conclusions of fact, and the order of the Commission should be reversed for lack of findings of fact. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506; *Florida* v. *United States*, 282 U. S. 194, 208. It therefore does not aid the Government to say that, in its ultimate conclusion, the Commission has taken a different view; for such a course leaves the basis for the order, in the words of Mr. Justice Brandeis,

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[4] The final use of "or" rather than "and" or "—" does not imply that the Commission intended to conclude that either UGI or United alone could control or exercise a controlling influence upon Public Service without the aid of the other. Indeed, in view of every other expression in its lengthy opinion, the Commission necessarily meant that ultimate control or controlling influence was in either United or UGI but only with the aid of the other. Logically, the Commission should have concluded that control was in United, for the Commission's own assumption is that United controls UGI. Except in cases of combination or conspiracy, control is commonly conceived as lying in some one entity. Moreover, the statute itself requires that subsidiary status be determined with reference to "a specified holding company" (Section 2(a)(8)). This difficulty seems to be the only reasonable explanation for the variation in phraseology in the Commission's ultimate conclusion.

> entirely to inference. This complete absence of "the basic or essential findings required to support the Commission's order" renders it void. (*United States* v. *B. & O. R. Co.*, 293 U. S. 454, 463, citing *Florida* v. *United States*, 282 U. S. 194, 215, and other cases.)

Plainly, in the assumption of the "UGI-United" entity or combination, the Commission seeks to make it impossible for a party to have an actual and factual determination of the real issue as Congress intended. In the court below that was the Commission's position, for it there said:

> Any other course would require the Commission to try a number of issues concerning control in each case. (Br. for Respondent, p. 13.)

The Commission thus seeks this Court's approval for its declination to assume the administrative duties which Congress has specifically imposed upon it.

III.

A third issue of law, arising both under the statute and Constitution and applicable to the administrative process generally, is the novel position of the Commission that it is not required to make a positive finding but may decline to do so—and thus decline to relieve petitioner of the status of subsidiary—merely because it chooses to say that it is not convinced of petitioner's independence (R. 27, 45-46). It seeks, by assumed analogy, to arrogate to itself the common law chancellor's discretion. It states to this Court that the issue "is whether petitioner sustained the burden" (Br. in Opp., p. 9) and insists that

> petitioner's burden was to convince the Commission. (Br. in Opp., p. 16)

By footnote it seeks to bolster this theory by reference to rules regarding strict construction of provisos and excep-

tions in statutes (Br. in Opp., p. 10, n. 2). But this proceeding is one for the determination of factual status. Moreover, the proceeding is not one before a chancellor for the issuance of a prerogative writ, but it is a statutory proceeding devised by Congress and governed by the terms of the statute.

Upon this theory the Commission seeks to escape from the settled rule that positive findings and conclusions are required to support administrative orders. Here there is no "definite finding" (*Atchison Ry.* v. *United States*, 295 U. S. 193, 201-202), none that are "specific on [the] ultimate and determinative issue" (*United States* v. *Pyne*, 313 U. S. 127, 130). Where there are "vague findings", as this Court has recently said, "statutory rights will be whittled away" (*United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489). Here, according to one of the chief sponsors of the statute in Congress, "the Commission is directed to make a finding" (79 Cong. Rec. 8397), but it chooses instead to say merely that it is not convinced. "Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency" (*United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510). The question is important and requires full consideration and review by this Court, for it applies to great and growing segments of the field of administrative law.

It is worthy of final note, moreover, that the Commission has not sought to apply separately the three applicable tests prescribed by the statute:

> (1) whether "the applicant is * * * controlled, directly or indirectly, by [a] holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever";
>
> (2) whether "the management or policies of the applicant are * * * subject to a controlling influ-

ence, directly or indirectly, by [a] holding company (either alone or pursuant to an arrangement or understanding with one or more other persons)"; and,

(3) in the latter event, whether the controlling influence is such "as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies."

In its discussion it combines (1) and (2) into the phrase "control or controlling influence," without any specification whatever as to any "arrangement or understanding" or "means or device" through which it apprehends such control or controlling influence in the instant case—other than the assumed joint stock ownership. It makes no attempt whatever to apply the third standard to the facts here, although in earlier opinions involving other parties it has been careful to do so. E.g., *West Penn Railways Company*, 2 SEC 992, 995-996; *H. M. Byllesby & Company et al.*, 6 SEC 639, 655-656. In this latter respect, therefore, it has not even attempted to apply the statute as Congress intended but at most has "determined only the dry legal question of its power." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 196.

IV.

The Government here does not attempt to justify the very numerous, gross, and material departures of the Commission's findings from the sole and undisputed evidence of record as set forth in Point II of the petition (pp. 39-49) and the Appendix (pp. 22-73). This issue is not one of fact but of law. In the words of Mr. Justice Brandeis, "An order based upon a finding made without evidence * * * or upon a finding upon evidence which clearly does not support it * * * is an arbitrary act" and as such "a denial of due process." *Northern Pacific* v. *Dept. Public Works,*

268 U. S. 38, 44-45. "A finding without evidence is arbitrary and baseless" and any other rule "would nullify the right to a hearing." *Interstate Com. Comm.* v. *Louisville & Nash. R. R.*, 227 U. S. 88, 91, 93.

> Even though the inaccuracies alluded to may have been caused solely by inadvertence rather than by arbitrary or capricious action, they nevertheless show that the Commission's decision was not based upon that careful consideration of the evidence which is properly, to be expected from an unbiased body of experts discharging a function so important from the standpoint of both the parties and the public. (*Saginaw Broadcasting Co.* v. *Federal C. Com'n*, 96 F. 2d 554 563-564 (D. C. App. 1938), cert. denied 365 U. S. 613.)

The right to a fair hearing and a fair decision for all parties is no less essential because large business interests are here involved, for civil rights will not long survive if protected only in some of the people.

V.

Due regard for the intention of the coordinate legislative branch of the Government—as well as grave questions of statutory construction, fair hearing, and methods of administrative decision—requires that this Court exercise its supervisory power to review the proceedings herein.

Respectfully submitted,

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